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DOCTOR OF PHILOSOPHY

Establishing a legal framework for the use and protection of Iraq's equitable right to the Tigris and the Euphrates River Basin

Ahmmad, Yadgar Kamal

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Yadgar Kamal Ahmmad

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**ESTABLISHING A LEGAL FRAMEWORK FOR THE USE
AND PROTECTION OF IRAQ'S EQUITABLE RIGHT TO
THE TIGRIS AND THE EUPHRATES RIVER BASIN**

2010

Yadgar Kamal Ahmmad

**A thesis submitted to the University of Dundee in fulfilment of the
requirement of the Degree of Doctor of Philosophy, May 2010.**

Table of Content

ACKNOWLEDGEMENTS.....	VI
SIGNED DECLARATION FOR SUBMISSION BY THE CANDIDATE.....	IX
SIGNED STATEMENT BY SUPERVISOR.....	X
THESIS ABSTRACT	XI
ABBREVIATIONS	XII
LIST OF FIGURES AND TABLES.....	XIV

CHAPTER ONE

INTRODUCTION.....	1
1.1 Origins of River Basin Development.....	2
1.2 Addressing the thesis issue.....	9
1.3 Thesis Question.....	12
1.4 Thesis Objective.....	13
1.5 Thesis Justification.....	14
1.6 Thesis Methodology and Analytical Framework.....	16
1.7 Scope of the thesis.....	18
1.8 Chapters of the Thesis.....	19

CHAPTER TWO

WATER USES WITHIN THE TIGRIS AND EUPHRATES RIVER BASIN	24
2.1 Introduction.....	24
2.2 Hydrographical context of TERB	25
2.3 Water development projects in TERB region by the riparian States.	34
2.4 Economic benefits of GAP to Turkey.....	36
2.5 Negative impacts of GAP on the riparian States.....	38
2.6 The reality of the new Iraq	43
2.6.1 <i>Iraq's Internal Water Problems</i>	44

2.6.2 <i>Status of the Marshlands in Iraq</i>	47
2.7 Conclusion.....	48

CHAPTER THREE

‘TERB’: TRANSBOUNDARY WATER QUANDARY BETWEEN THE THREE RIPARIAN STATES52

3.1 Introduction	52
3.2 Water Conflicts in the Middle East.....	54
3.2.1 <i>Water security</i>	57
3.2.2 <i>Hydro-Geographical diversities</i>	60
3.2.3 <i>Energy security</i>	60
3.3 Definitions and Theories of Conflicts	62
3.4 Definition and theories of Cooperation.....	64
3.5 Types of conflicts over water resources	65
3.6 Cooperation under International politics.....	66
3.6.1 <i>Hydro-Hegemony v. Balance Of Power Theory</i>	69
3.6.2 <i>International Law v. Balance of Power Theory</i>	73
3.6.3 <i>Evolution of international water law</i>	75
3.7 Conclusion.....	78

CHAPTER FOUR

APPLICABLE INTERNATIONAL LAW TO THE RIPARIAN STATES OF THE TERB.....80

4.1 Introduction	80
4.2 General background of International Law	80
4.3 Subjects of International Law	81
4.3.1 <i>Sovereignty of Iraq under International Law</i>	84
4.4 Rights of States under International Law	91

III

4.4.1 <i>Legal and Political independence</i>	91
4.4.2 <i>State's Legal equality</i>	92
4.4.3 <i>State's right to peaceful coexistence</i>	93
4.5 Obligations of States under international law	94
4.5.1 <i>State's Obligations to refrain</i>	94
4.5.2 <i>State's Obligation to peaceful disputes settlement</i>	95
4.5.3 <i>State's Obligation to cooperate</i>	95
4.6 Sources of international law	97
4.6.1 <i>Determination of Article 38 in terms of content</i>	98
4.6.2 <i>Determination of Article 38 in terms of application</i>	109
4.7 Enforcement of international law in relation to the TERB	111
4.7.1 <i>Particular Agreements made and concluded between the riparian States</i>	117
4.8 Conclusion	118

CHAPTER FIVE

APPLICABLE INTERNATIONAL WATER LAW IN THE 'TERB' 121

5.1 Introduction	121
5.2 Customary international water law	123
5.3 Work of the ILC on the UNWC 1997	124
5.3.1 <i>Scope of the UNWC 1997</i>	127
5.3.2 <i>Substantive norm: (Equitable utilisation and No-Significant Harm)</i>	128
5.3.3 <i>Obligation to inform, consult and engage in good faith negotiation</i>	132
5.3.4 <i>Implementation Instruments and Dispute Settlement Mechanisms</i>	134
5.4 Turkish Persistent Objection to the UNWC 1997	137
5.5 Competence of the UNWC 1997	142
5.6 The application of <i>lex lata</i> and <i>lex ferenda</i>	150
5.7 Conclusion	152

CHAPTER SIX**LEGAL REGIME OF THE INTER-STATE RELATIONSHIPS 155**

6.1 Introduction	155
6.2 Past and present treaties and protocols between the riparian States of the TERB..	155
6.3 States' Origins of Claims and Considerations	165
6.3.1 <i>Considerations by the Turkish Government</i>	165
6.3.2 <i>Considerations by the Syrian Government</i>	169
6.3.3 <i>Considerations by the Iraqi Government</i>	171
6.4 State's Compliance of international obligation	181
6.5 Conclusion.....	184

CHAPTER SEVEN**NEW PHASE OF TRANSBOUNDARY WATER MANAGEMENT OF 'TERB'
..... 187**

7.1 Introduction	187
7.2 Tigris and Euphrates Rivers Commission.....	191
7.2.1 <i>Directing Joint Technical Committee</i>	196
7.2.2 <i>Involving in the Treaty Making Process</i>	197
7.3 Conclusion.....	206

CHAPTER EIGHT**CONCLUSION..... 208****ANNEX I**

Treaty of Friendship and Neighbourly Relations between Iraq and Turkey was signed at Ankara, on 29 March 1946.....	220
--	-----

ANNEX II

Law No. 14 of 1990, Ratifying the Joint Minutes Concerning the Provisional Division of the Waters of the Euphrates River Between Iraq and Syria	228
---	-----

ANNEX III

Agreement Between Syria and Turkey	231
--	-----

ANNEX IV

Joint Communiqué between GAP and GOLD	237
---	-----

BIBLIOGRAPHY	240
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SIGNED DECLARATION FOR SUBMISSION BY THE CANDIDATE

I, the candidate hereby acknowledge:

- (a) I am the author of this thesis;
- (b) Unless otherwise stated, all references cited have been consulted;
- (c) The work of which the thesis is a record has been done by the candidate;
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I, the supervisor, hereby acknowledge that the conditions of the relevant Ordinance and Regulations have been fulfilled.

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Date:

THESIS ABSTRACT

This thesis investigates the mechanisms that might be used to determine the rights and obligations of Turkey, Syria and Iraq to govern the Tigris and Euphrates River Basin (TERB) in accordance with the international water law. In particular, it advocates for the protection of Iraq's equitable rights through the establishment of a legal and institutional framework for joint use of the TERB. As a contribution towards addressing the issues of transboundary water law at the TERB level, this thesis explores the possibilities for potential cooperation between the three riparian States of the TERB through forming a legally binding treaty under the auspices of contemporary international water law. From this perspective, the thesis hypothesises that international law provides a solid basis on which the State of Iraq can rely on for achieving its legal entitlements to the equitable and reasonable use of the TERB.

In this context, the thesis first examines international law in order to establish how it applies to the TERB. Next, the thesis considers how the legal positions of the riparian States can be determined under international law. When the aforesaid requirements are met, the thesis makes recommendations on how international water law can strengthen the legal framework for equitable joint use of the TERB.

The thesis offers the methodology and analytical framework that deals with different relevant issues covered within the scope of the thesis. Later on, water uses within the TERB are discussed, followed by a literature review of publications on contemporary Middle East transboundary water conflict and cooperation. Afterwards, the thesis examines the applicable international law and international water law to the riparian

States of the TERB. Finally, it explores the legal regime of the inter-State relationships in order to foster improved transboundary water management of the TERB.

ABBREVIATIONS

BCM	Billion Cubic Meters
CARE	Cooperative for American Remittances to Europe
DDROS 1949	Draft Declaration on the Rights and Obligations of States prepared in 1949
DPILCFRCS 1970	Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States
DSI	General Directorate of State Hydraulic Works
DSS	Decision Support System
GAP	Great Anatolia Project
GC IV 1949	Geneva Convention IV 1949
GOLD	Administration and Syrian General Organization for Land Development
ICJ	International Court of Justice
ILC	International Law Commission
LAM	Legal Assessment Model
MCROS 1933	Montevideo Convention on the Rights and Obligations of States 1933.

XIII

NBI	Nile Basin Initiative
NGOs	Non-Governmental Organisations
PKK	Kurdish Workers Party
RHC 1907	Hague Convention IV 1907
TERB	Tigris and Euphrates River Basin
TFNRIT 1946	Treaty of Friendship and Neighbourly Relations between Iraq and Turkey in 1946
UN	United Nations Organisation
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
UNWC 1997	United Nations Convention on the Law of the Non-navigational Uses of International Watercourses 1997
USAID	United States Agency for International Development
VCLT 1969	Vienna Convention of the Law of Treaties in 1969

LIST OF FIGURES AND TABLES

A. FIGURES

Figure 1: Map of Tigris and Euphrates River Basin (Modified).....	26
Figure 2: Length of Tigris and Euphrates River Basin in each riparian State.	27
Figure 3: Annual Contributions to the Tigris and Euphrates River Basin by the riparian States.	28
Figure 4: The drainage area of Tigris and Euphrates River Basin in each riparian States	29
Figure 5: Lands irrigable from Euphrates flows (million hectare)	33
Figure 6: Roadmap for identifying State's Rights and Obligations, and provisions for making Treaty.....	204
Figure 7: Functioning structure of TERS.....	205

B. TABLES

Table 1: Availability of Water by Region in the World.....	57
Table 2. The similarity and differences of approaches by the riparian States	172

CHAPTER ONE

INTRODUCTION

“Fierce national competition over water resources has prompted fears that water issues contain the seeds of violent conflict.... If we work together, a secure and sustainable water future can be ours.” (Kofi Anan, Secretary General of the United Nations, March 22nd 2002)¹

“Neither Syria nor Iraq can lay claim to Turkey’s rivers any more than Ankara could claim their oil... The water resources are Turkey’s, the oil resources are theirs. We don’t say we share their oil resources, and they can’t say they share our water resources.” (Suleyman Demirel, Turkish President, 1992)²

“Water is life... Many analysts believe disputes over water will be a major cause of military conflict in the region. We want water to be a source of cooperation. We want to resolve this peacefully and in accordance with international law. But if the GAP project goes ahead as planned and without an agreement, within five years more than 7 million Syrians would suffer from salt water pollution and damage to agriculture and drinking water. We are doing our best to attract Turkey to the table to negotiate and to prevent military conflict.” (Waleed Mu’allim, Syrian Deputy Minister for Foreign Affairs, 31st January 2002)³

¹ UN warns of looming water crisis, 2002, BBC World News, available at: <http://news.bbc.co.uk/1/hi/1887451.stm>, accessed 15 May 2010.

² Reed, Christopher, 2005. Paradise Lost: What should-or can-be done about the environmental crime of the century? *Harvard Magazine*. Available at <http://www.harvardmagazine.com/on-line/010538.html>, accessed 12 March 2008. also Akanda, Freeman A & Placht, M. 2007. The Tigris-Euphrates River Basin: Mediating a Path Towards Regional Water Stability *Annakhla, The Fletcher School Journal for issues related to Southwest Asia and Islamic Civilization* Available at http://fletcher.tufts.edu/al_nakhlah/archives/spring2007/placht-2.pdf, accessed 24 May 2008.

³ The Corner House Correspondent. 2002. *Downstream Impacts of Turkish Dam Construction on Syria and Iraq: Joint Report of Fact-Finding Mission to Syria and Iraq, Kurdish Human Rights Project, The Ilisu Dam Campaign*. Available at <http://www.thecornerhouse.org.uk/pdf/document/IraqSyri.pdf> accessed 20 March 2007.

Water is an essential resource, a source of life for humankind and every living creature on this planet. It is needed for drinking, personal hygiene, food production, and industrial activities. In addition, it has important non-consumptive uses, such as fishing, shipping, hydropower generation, and recreation. Although water is the most abundant subsistence on earth, the quantity of fresh water is globally finite. Water also plays an important role in cultural identity or religious beliefs of local people.⁴ Mankind used to inhabit areas close to rivers in order to have ‘uncomplicated accesses’ to the water.⁵ In history, rivers have played a critical role for mankind by connecting people through their navigable channels, and promoting the concentration of human settlement and the development of the most ancient civilisations along riverbanks.⁶

1.1 Origins of River Basin Development

The Nile, Tigris and Euphrates, Indus, and Yellow river basins were home to some of the world’s earliest advanced civilisations. These rivers were considered as a tremendous resource as well as a potential liability for the basins’ inhabitants, prompting early experimentation into methods to control their flow. More than 4000 years ago the Sumerians, the Egyptians and later the Chinese constructed complex hydraulic systems for irrigation, flood control, and ultimately transportation purposes. The accruing economic benefits were substantial. Irrigation canals, for example, allowed for increased agricultural production and a greater variety of food products.

⁴ Mostert, Eric., 2003. *Conflict and Cooperation in the Management of International Freshwater Resources: A Global Review* PCCP, Publications, at p. 3. Available at <http://www.unesdoc.unesco.org/images/0013/001332/133258e.pdf>, accessed 16 November 2008.

⁵ Tanzi, A., & Arcari, M., 2001. *The UN Convention on the Law of International Watercourses, A Framework for Sharing*. The Netherlands: Kluwer Law International, at p. 4. also Wolf, Aaron T 1998, Conflict and Cooperation along International Waterways, *Water Policy*, (1), pp. 251. Available at http://www.transboundarywaters.orst.edu/publications/conflict_coop/, accessed 16 May 2007.

⁶ Tanzi, Ibid., at p. 4.

As irrigation canals were expanded to accommodate transportation needs, military, commercial and political advantages followed.⁷

A significant trend towards conflict over international watercourses has been observed since the development of hydroelectric power,⁸ particularly in the first half of the twentieth century.⁹ International river basins cover more than half of the land's surface area.¹⁰ For example, there are nearly 300 major watercourses shared by two or more States in which approximately one-third of it are shared by more than two sovereign States.¹¹ Tanzi mentions that due to diversification of human utilisation of water, for agricultural and industrial as well as for domestic purposes, and the high rate of world population growth, the level of global water withdrawal has increased by a factor of six.¹² This statistic demonstrates the concerns of water specialists about the current global water problems, who have coined the term 'water scarcity'.¹³ In this regard, McCaffrey said:

“...the burgeoning global population, the increasing concentration of people in cities, increased water user per capita,

⁷ Meredith, Giordano A. 2002. *International River Basin Management: Global Principles and Basin Practice*. Oregon State University, at p. 1. Available at <http://www.bvsde.paho.org/bvsacd/cd30/giordano.pdf>, accessed 13 July 2008.

⁸ Water conflict around the world has been attributed to social and demographic changes, especially population growth. Thus, an important challenge for this century's water managers will be preventing this water resource competition from escalating into conflict. Fesler, Kristel J. 2007. *An Analysis of Water Resource Conflict and Cooperation in Oregon between 1990 and 2004*. Oregon State University, at pp. 3-4. Available at <http://ir.library.oregonstate.edu/jspui/bitstream/1957/5700/1/KristelFeslerThesis.pdf>, accessed 13 March 2009.

⁹ Also the problem grew since the introduction of systematic irrigation planning for large arid and semi-arid areas of America, Africa and Asia. U.S. Department of State. 2002 *Achieving Sustainable development Global Issues, International Information Programme*, 7(1). Available at <http://usinfo.state.gov/journals/itgic/0402/ijge/ijge0402.htm>, accessed 19 February 2008.

¹⁰ Hamner, Jesse H. & Wolf, Aaron T. 1998. Patterns “In International Water Resource Treaties: The Transboundary Freshwater Dispute Database,” *Colorado Journal of International Environmental Law and Policy*, 1997 Yearbook. Available at <http://www.transboundarywaters.orst.edu/publications/patterns/>, accessed 17 February 2008.

¹¹ From those 300 rivers, 19 of them involve five or more sovereign States. Ibid.

¹² Tanzi, *Supra*, footnote 5, at p.6.

¹³ Ibid.

and the need to import water in different combinations or sometimes even in isolation, add a dimension to the world's freshwater problems that is of growing significance: risk of frictions with countries sharing the same sources of water.” (McCaffrey)¹⁴

In addition to the abovementioned statement, it is generally estimated that in the forthcoming decades two-thirds of the world's population is likely to live in countries with moderate or severe water shortages.¹⁵ Besides that, there will be more changes in water quantity and quality due to intensive use of rivers within the territory of upstream States that passes negative deposits to the territory of its downstream States.¹⁶ As a result, this ‘water scarcity’ only serves to intensify competition between joint users over its quantity and quality and will likely escalate tensions and the potential for conflict between States of diverse political boundaries,¹⁷ if it has not already happened.¹⁸

Commentators who assert that water wars are imminent may have a valid basis for their assertions, as the United Nations Organisation (hereinafter the UN) forecasts that more than half of the world's population will suffer the direct consequences of water scarcity if the current development patterns continue.¹⁹ The rapid population and economic growth in many regions of the world could result in serious water problems

¹⁴McCaffrey, Steven C., 2001. *The Law Of International Watercourses: Non-Navigational Uses*, Oxford University Press, at pp. 15-16.

¹⁵ Uitto, Juha I., & Duda Alfred M., 2002. Management of Transboundary Water Resources: Lessons from International Cooperation for Conflict Prevention. *The Geographical Journal* 168, (4), at pp. 365-366.

¹⁶ Tanzi, *Supra*, footnote 5, at p 5.

¹⁷ Giordano, Meredith A., & Wolf, Aaron T. 2003 Sharing waters: Post-Rio international water management. *Natural Resources Forum*, (2) at p. 164.

¹⁸ The essence is that when two or more nations share the same watercourse whose water flow is not sufficient to meet the needs of all users, then conflicts and disputes among riparian States are prepared for eruption, and international peace is threatened as a result. Tanzi, *Supra*, footnote 5, at pp. 6-7.

¹⁹ Water, A Shared Responsibility. 2002. *World Water Development Report*, The UNEP, (2), at p.2. Available at <http://unesdoc.unesco.org/images/0014/001444/144409E.pdf>, accessed 24 March 2007.

and related stress in the foreseeable future.²⁰ For example, over the next fifteen years, in Asia alone, one billion more people will have to share the region's scarce water supplies.²¹ In the Middle East, due to the lack of clear cooperation or a good water governance strategy between the neighbouring States,²² the situation can be regarded as more worrying. For example, the riparian States to the Nile River have problems with population and economic pressures,²³ which are growing faster than the Nile's capacity to sustain development. This mounting pressure exacerbates the pre-existing controversies in the theory of 'conflict and co-operation' issues in sustaining an equitable management to the water resources of the Nile basin.²⁴

The nature of such a conflict could lead to a more serious situation if the available water is sufficient to meet all the riparian demands but one co-riparian State controls the river in a manner which discounts the rights of the other co-riparian States of the

²⁰ Nandalal, K.D.W., & Simonovic, Slobodan P., 2003. *State-Of-The-Art Report On System Analysis Methods For Resolution Of Conflicts In Water Resources Management* PCCP Publications, (4), at p 2. Available at <http://webworld.unesco.org>, accessed 13 February 2008.

²¹ Governments Failing to Tackle World Water Crisis, EU Water Plan Makes Feeble Progress In Four Years. 2006. *New Report Tearfund Website*. Available at <http://www.tearfund.org/> accessed 17 July 2007.

²² Since the 1970s, States in the Middle East have largely been unable to meet basic water needs for food production and industrial use. While water is a transboundary resource requiring effective multilateral management, such cooperation has so far been lacking in the Middle East. Jobson, Suki., 2003. *Water Of Strife: The Geopolitics Of Water In The Euphrates-Tigris And Jordan River Basins*. *The Royal Institute Of International Affairs, Middle East Programme, Briefing Paper*, (4), at p.1.

²³ The New Courier, October 2003. *Averting conflict in the Nile basin*. Available at http://portal.unesco.org/en/ev.php-RL_ID=14364&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed March 2009.

²⁴ The disparities between countries are wide and some are already faced with constraints in meeting domestic water demand owing to physical, socio-economic and political factors. As a result, water and water-supply systems may become instruments of political confrontation and objectives of military operations as the global population expands. Water quality has also become a crucial factor in the discussion over water availability, conflict and cooperation. In many countries, both developing and developed, current water use is not sustainable because water is poorly allocated and/or managed. The situation is especially grim in the Middle East and North Africa. Charier, B., Dinar, S., & Hiniker, M. *Water, conflict resolution and environmental sustainability in the Middle East*. *Office Arid Lands Studies*, (44). Available at <http://cals.arizona.edu/OALS/ALN/aln44/charrier.html>, accessed March 2008.

shared basin.²⁵ The existing problem over the Tigris and Euphrates River Basin (hereinafter “the TERB”) between Iraq, Syria and Turkey (hereinafter the riparian States) to which this thesis will be dedicated, falls under this description. It has been argued that if such transboundary issues are not solved in an equitable manner, problems are liable to escalate for the next generation because of the central role of water in sustaining the existence and development of States²⁶ and become the twenty first century’s most fundamental need.²⁷ It has been shown from past experience that the mere promise, or even actual action, to increase the water flow from the upstream States to the downstream States does not satisfactorily represent the true meaning of cooperation.²⁸

It has been suggested that States could take a rigid stance with regard to the control and use of disputed shared watercourses, based on an extreme vision of State’s sovereignty over the portion of the transboundary watercourse lying within their national territory. As a result, upstream States claimed absolute freedom to utilise transboundary waters regardless of the impact such activities could have on

²⁵ Caponera, Dante A. 2003. *National and International Water Law and Administration*. Netherlands, Kluwer Law International, at pp. 265-273. also Hirsch, Abraham M., 1956. Utilization of International Rivers in the Middle East, *The American Journal of International Law*, 50, (1), at p. 84.

²⁶ Sustainable Development, as defined by the World Commission on Environment and Development, is “the capacity to meet the needs of the present without compromising the ability of future generations to meet their own needs.” Development needs are now understood to go beyond economic issues to encompass the full range of social and political issues that define the overall quality of life. US Department of State, *Supra*, footnote 9, at pp.2-3.

²⁷ Dellapenna wrote that water is unquestionably one of the most important of all the resources that depend upon for the survival and thriving of States. Dellapenna, J. W. The Customary International Law of Transboundary Fresh Waters, in Bogdanovic, Slavko. (Ed), *Legal Aspects of Sustainable Water Resources Management Proceedings*. Yugoslav Association for Water Law, 2002, at p. 22.

²⁸ Galien, Michael van der. 2009. Turkey promises Iraq double water supply, *Poli Gazette*, 25 March. Available at <http://www.poligazette.com/2009/03/25/turkey-promises-iraq-double-water-supply/> accessed October 2009. also Iraq Demands More Water from Turkey, Syria. 2009. *Circle of Blue WaterNews, Reporting the Global Water Crisis*, September. Available at <http://www.circleofblue.org/waternews/2009/world/iraq-demands-more-water-from-turkey-syria/> accessed October 2009. In response, Turkey has agreed to release more water from the Euphrates River to drought-ravaged Iraq. Turkey to release more water from Euphrates: Iraq. 2009. *World Bulletin*, 19 September. Available at http://www.worldbulletin.net/news_detail.php?id=47449, accessed October 2009.

downstream States, according to the principle ‘absolute territorial sovereignty theory’. Conversely, downstream States claimed the right to receive unaffected natural flow of waters coming from upstream States’ territory, following the principle ‘absolute territorial integrity’ theory.²⁹ The above theories were categorised as underdeveloped and of unclear status. International water law has progressed during the last century, and these extreme theories are now almost obsolete since a middle course has found its place in the contemporary international water law and practice, termed ‘limited territorial sovereignty’ of riparian States.³⁰ Currently, it is believed that the evolution of the ‘limited territorial sovereignty’ theory will have a strong impact on riparian States and solve the problems of the joint use of water by riparian States. It is not only their voluntarily acceptance to the principle, but also the circumstances that require it.

²⁹The doctrine of absolute territorial sovereignty provides that States have exclusive sovereignty over their territory and that this sovereignty is unfettered by the interests of any other State, meaning that a State may exploit natural resources situated in its territory to the extent desired, regardless of any transboundary consequences. McCaffrey, *Supra*, footnote 14, at p. 77, also Caponera, Dante A., 1992. *Principles of water law and administration: national and international*, Netherland, Balkema, at p. 213. Perhaps the earliest, the most direct, and the most famous articulation of absolute territorial sovereignty is then U.S. Attorney General Judson Harmon’s assertion that the United States did not owe to Mexico a duty to desist its diversions of water from the Rio Grande so that Mexico could also enjoy the use of the river’s waters. Thorson, Erica J., 2009. Sharing Himalayan Glacial Meltwater: The Role Of Territorial Sovereignty. *Duke Journal Of Comparative & International Law*, 19(487), at p. 494. also McCaffrey, *Supra*, footnote 14, at p. 77.

³⁰The Theory of Limited Territorial Sovereignty is based on the assertion that every State is free to use shared rivers flowing through its territory as long as such utilisation does not prejudice the rights and interests of the co-riparian State. In this case, sovereignty over shared water is relative and qualified. The co-riparian State has reciprocal rights and duties in the utilisation of the waters of their international watercourse and each is entitled to an equitable share of its benefits. This theory is also known as the ‘theory of sovereign equality and territorial integrity’. Rahaman, M. Mizanur., 2009. Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis. *Water Resources Development*, 25 (1), at p.160. Available at http://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-Ganges-Water_Res_Devel.pdf, accessed 23 May 2010. It is noteworthy that this theory has been adopted in 1995 Agreement on the cooperation for the sustainable development of the Mekong River basin (Articles 4–7). Agreement on the cooperation for the sustainable development of the Mekong River Basin, Apr. 5, 1995 (entered into force Apr. 5, 1995), reprinted in 34 I.L.M 864 (1995), also Article (2) of SADC protocol on shared watercourse systems. Protocol on Shared watercourse system in Southern African development community (SADC) region, Aug. 28, 1995 (entered into force Sep. 29, 1998), reprinted at http://www.africanwater.org/SADCprotocol_Original.PDF [accessed 18 May 2010]. also Articles (7) and (9) of the 2002 framework agreement on the Sava River Basin. Framework Agreement on the Sava River Basin, Dec. 3, 2002, reprinted at http://www.savacommission.org/dms/docs/dokumenti/documents_publications/basic_documents/fasrb.pdf [accessed 12 May 2010]

Daoudy remarked on this issue that building cooperative upstream-downstream relationships were becoming increasingly important in the realisation of State's national goals and that the unilateral use of resources by a neighbouring State³¹ does not achieve the desired objectives. Therefore, some States choose peaceful settlement by entering into formal agreements in the form of bilateral or multilateral treaties relating to their shared watercourses, although such a process can be time consuming and financially costly. For example, the Indus agreement took 10 years while the Ganges Agreement needed 30 years. For the Israel-Jordan agreement, 40 years were necessary to build trust and a sense of ownership of the process by the countries involved.³² In this context, the question arises, how many more years will be needed to build trust among the three riparian States to end the anxiety of the downstream State, Iraq? These issues are prompting calls for a hardworking process of legal work and implementation.

Next, sometimes the required 'good provisions' that can be the main basis for success, were not included in the terms of treaties. The reasons for their omission could be due to the obstacles of making explicit formal agreements represented in, among other things, the upstream and downstream considerations stated above. Nevertheless, it can be asserted that the signs of cooperation will exist where there is willingness among States to make treaty. For example, the protocol of 1987 between Turkey and Syria, although it was of a temporary nature and was further disputed by Iraq, can be considered as a good example for the two riparian States to cooperate and solve their

³¹ Daoudy, Marwa, Water-Sharing Between Syria, Iraq and Turkey, Negotiation, Security and Power Asymmetries, A Fascinating Inquiry into Troubled Waters. Available at www.cnrseditions.fr/Doc/Depliants/D227106290X.pdf accessed 15 June 2007.

³² International Decade for Action, Water for Life 2005–2015, *The United Nations*. Available at <http://www.un.org/waterforlifedecade/pdf/waterborders.pdf>, accessed 15 May 2009.

water issues together,³³ despite a lack of implementation. Another example is the Water Allocation Agreement between Syria and Iraq, the Protocol of 1990, which led to the Three-Stage Plan between the riparian States.³⁴ Further discussion in this regard will be given in subsequent Chapters.

1.2 Addressing the thesis issue

In principal, it can be accepted that legal agreements on joint water use have been negotiated even among bitter enemies and maintained even as conflicts have persisted over other issues. For example, in the East and Southeast of Asia, Cambodia, Laos, Thailand and Vietnam, supported by the UN, have been able to cooperate since 1957 within the framework of the Mekong River Commission, formerly known as the Mekong Committee, and technical exchanges continued throughout the Vietnam War.³⁵ In Central Asia the Indus River Commission, established with World Bank support, survived two wars between India and Pakistan.³⁶ In Middle East, since 1955 Israel and Jordan, with United States involvement, have held regular talks on the

³³ Article 7 of the protocol states that the two sides shall work together with the Iraqi side to allocate the waters of the rivers Euphrates and Tigris in the shortest possible time. Article 8 states that “the two sides agreed to expedite the work of the Joint Technical Committee on Regional Waters. Kibaroglu, A., 2002. *Building A Regime for the Waters of the Euphrates-Tigris River Basin*. London, Kluwer Law International, at pp. 249-250.

³⁴ The Three-Stage Plan came from what Iraq formulated during one of the Joint Technical Committee Meetings, the following plan to share the waters of the Euphrates: At the first step, each riparian States will notify its water demand for each of its completed projects as well as for the projects under construction or planned, as the second step, hydrologic data will be exchanged on the Euphrates and Tigris waters, and finally, after gathering all relevant data, the Joint Technical Committee will first of all, calculate the demands of water for projects under operation, then for the projects under construction, and finally for the planned projects. The determination of needs for these projects will be made separately by each riparian. Ibid., at pp. 251-252. Turkey Stated that it has taken all the necessary measures in order not to cause significant harm to the downstream riparian, yet there are disputes between the parties on the apportionment between them of the Euphrates water. McCaffrey, *Supra*, footnote 14, at p. 81.

³⁵ Jacobs, Jeffrey W. 2002. The Mekong River Commission: Transboundary Water Resources Planning and Regional Security. *The Geographical Journal* 168 (4), at p. 357.

³⁶ Campana, Michael E. 2009. We Won't Let Each Other Go Thirsty. *SEED Magazine*. Available at http://seedmagazine.com/content/article/the_truth_about_water_wars/ accessed 22 December 2009.

sharing of the Jordan River, even as they were until recently in a legal state of war.³⁷ Finally, in Africa, a framework for the Nile River Basin, home to 160 million people and shared among 10 countries, was agreed in February 1999 in order to fight poverty and spur economic development in the region by promoting equitable use of, and benefits from, common water resources. This initiative, supported by the World Bank (hereinafter the WB) and the UN Development Programme (hereinafter the UNDP), is a transitional arrangement until a permanent framework is put in place.³⁸ The nine Niger River Basin countries have agreed on a framework for a similar partnership.³⁹

These cases reveal two important elements of cooperation under the term ‘international water resources management’, they are: firstly, the need for building an institution that effectively develops the process of engagement over time, and secondly, inviting a well-established third-party support trusted by all factions.⁴⁰ In such a context, it is argued that there is something missing in most of the UN and other nongovernmental organisations’ reports regarding the TERB to date. Nobody has discussed in detail the nature of establishing any formal institution sponsored by a third party that would manage the TERB between the riparian States. Even where such an idea is mentioned, it is dealt with in a pessimistic and overwhelmingly negative manner. It is therefore justified to underline the present situation which emerges and to

³⁷ Morel, B., Security and the Environment in the Middle East Water Issues. in NATO Security through Science Series. (Ed), Environmental Security and Environmental Management: The Role of Risk Assessment. Netherland, Springer, 2006, at p. 24. Available at <http://www.springerlink.com/content/n7w34hju517u/?p=de3956906c434af6a06e7de46061f334&pi=0>, accessed 22 February 2010.

³⁸ Water Without Borders. 2003. *International Year of Fresh Water*. Available at http://www.wateryear2003.org/en/ev.php-URL_ID=3679&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 16 February 2010.

³⁹ Water Without Borders, *International Decade for Action, Water for Life 2005–2015, The United Nations*. Available at <http://www.un.org/waterforlifedecade/pdf/waterborders.pdf>, accessed 16 February 2010.

⁴⁰ Ibid.

call for immediate action by the riparian States to achieve a better form in management the TERB.

In addressing the thesis issue, as far international agreements vis-à-vis the nature of conflict is concerned, the downstream State of Iraq is identified as one of the five countries where water supplies for irrigation are most threatened and where that threat could exacerbate regional instability.⁴¹ Notwithstanding the recent years of serious droughts in the region, Wolf identified Iraq as one of those countries that rely heavily on irrigation and whose agricultural water supplies are threatened either by a decline in quality or quantity. Furthermore, the list of countries most threatened coincides precisely with current global security concerns: India, China, Pakistan, Iran, Uzbekistan, Bangladesh, Iraq, and Egypt.⁴² Turkey, the upstream co-riparian TERB State started building dams on both Tigris and Euphrates for hydroelectric energy and for agriculture purposes since 1950s while lacking any binding, single and comprehensive agreement between the riparian States over the joint use of the TERB.⁴³ In addition, the construction and operation of dam projects in Turkey continue to threaten the use of waters in Syria and Iraq that could potentially intensify the conflicts more between Iraq and Turkey due to reconstruction process in Iraq⁴⁴ and

⁴¹ Statement by Thomas Chrisman, a professor of environmental engineering at the University of Florida who worked extensively on water projects in the Middle East and Mediterranean. Lowy, Joan., 2004. Conflict With Iraq: Post-War Iraq Will Face Big Water Problems. *Naples Daily News*. Available at <http://www.naplesnews.net/03/04/naples/d913454a.htm>, accessed 23 July 2007. also Onion, Amanda., 2004. Postwar Iraq Faces Big Water Problems in Near and Far Future. *ABC News*. Available at <http://abcnews.go.com/Technology/story?id=97667&page=1> accessed March 2010.

⁴² Wolf, Aaron T., 2007. Shared Waters: Conflict and Cooperation. *Oregon State University, Corvallis*. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1077219, accessed 13 March 2009.

⁴³ Ibid.

⁴⁴ Iraq has undergone 26 years wartime devastation, which led basic services significantly deteriorating especially in water supply, fuel, and electricity, inadequate shelter, sanitation, and medical care are creating hardship for many Iraqis. Ibid. also Sanford, Jonathan E., 2003. Iraq's Economy: Past, Present, Future. *Report for Congress, Foreign Affairs, Defence, and Trade Division*. Available at <http://www.au.af.mil/au/awc/awcgate/crs/r131944.pdf>, accessed February 2008.

especially once the hydropower projects in Turkey reach completion which is believed to be in about 2014.⁴⁵

1.3 Thesis Question

As a contribution towards addressing the issue of transboundary water law in the Middle East, this thesis will investigate potential cooperation over the TERB. Two key factors led to the building of the thesis key hypothesis. They are international institutions and international relations. From the view of international institutions regime, such institutions have influence in the resolution of freshwater conflicts, while international relations theory holds that these institutions, as Hafterndorn argues, enable the exchange of information between States, thereby increasing confidence and resulting in the cooperative solving of conflicts. Based on these theories, the key hypothesis of the current thesis asserts that international law is the principal basis for the State of Iraq to rely on for the purpose of achieving its legal entitlements to equitable and reasonable use of its transboundary waters.

From the above mentioned hypothesis, the thesis question can be driven to consider: How can international water law assist Iraq in securing an equitable and reasonable share of the waters of the Tigris and Euphrates River Basin

In other words, how Iraq, as a new Federal State⁴⁶ can identify its legal rights and obligations in sharing water with its neighbours, and further to discover the maximum

⁴⁵ Daly, John C. K., 2008. Turkey's Gap Project: A Mixed Blessing For Country And Its Neighbors. *Eurasia Daily Monitor*, 5(135). Available at [http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=33807](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=33807), accessed October 2009. Upon this, the possibility of conflict increases in such cases where this construction has harmful consequences for the lower-lying states such as water shortages. Haftendorn, Helga., 2000. Water and 'International Conflict'. *Third Water Quarterly*, 21(1), at p. 52.

benefit possible naturally provided by the international law for the new Iraq concerning the use and equitable access of shared water from the neighbouring countries.

1.4 Thesis objective

To consider the mechanism by which rights and obligations of the riparian States of the TERB shall be determined under international law, the thesis presents the following three key objectives, they are:

Firstly, examining international law in order to establish a context by which to understand how international water law might be applied to the TERB, which will be discussed in Chapter Four.

Secondly, to investigate and determine the legal positions of the riparian States under the application of the international law; Chapters Five and Six will carry out this obligation pursuant to Chapter Four.

Thirdly, providing recommendations on how international water law can strengthen the legal framework for equitable utilisation of the TERB as a potential cooperation between the riparian States.

Pursuant to the above three main objectives, synopsis of the key political, social, economic and environmental issues relating to the sharing of the TERB will be sub-objective of the thesis to which Chapter Two is dedicated.

⁴⁶ Article 1 of the New Iraqi Constitution, which States: “Article (1): The Republic of Iraq is an independent, sovereign nation, and the system of rule in it is a democratic, federal, representative (parliamentary) republic.” *Constitution of Federal Republic of Iraq*, 2005, reprinted at http://www.uniraq.org/documents/iraqi_constitution.pdf, [accessed 23 February 2010].

1.5 Thesis Justification

Once the above thesis question is understood, the justification of the thesis is quite obvious. There are two important elements for the thesis justifications; firstly, to consider why there is a need for international law in the reform of the management of the TERB, and secondly, why this should be examined in a PhD thesis? To address the first issue, for two decades Iraq has undergone wars and economic sanctions, and is currently under occupation.⁴⁷ As a consequence, water infrastructure and services have deteriorated throughout Iraq and have left many Iraqis experiencing water shortages.⁴⁸ Since there is a new democratically elected government, and the country is currently under the reconstruction process, Iraq will need security of water supply in order to meet its domestic, industrial and agricultural needs. Both the Tigris and Euphrates rivers have been, and continue to be, the most essential component of Iraq's economy, especially for irrigation, for thousands of years. Without such water security, tensions between the riparian States like of the January 1990 could most likely arise again. In that case, Turkey restricted the flow of the Euphrates River to Syria and Iraq in order to fill the reservoir of the Ataturk Dam⁴⁹ that led water shortages for both Syria and Iraq. Thus, it is suggested that unless there is a comprehensive treaty between the riparian States on how to manage their joint use of the TERB, future conflict seems

⁴⁷Military, Iran-Iraq War (1980-1988). *Global Security Forum*. Available at <http://www.globalsecurity.org/military/world/war/iran-iraq.htm>, accessed 14 February 2008. also *The situation between Iraq and Kuwait Resolution 661*, Aug. 2, 1990, U.N.S.C. at its 2932nd meeting, S/21470 (1990), reprinted at [accessed 26 May 2010]

⁴⁸For example according to a report published by IRIN News website on February 6th 2006, residents of Baghdad's suburbs have been experiencing serious water shortages for a month due to poor infrastructure, leaking pipes and wastage, according to experts. Iraq: Severe water shortage hits Baghdad suburbs. UN Office for the Coordination of Humanitarian Affairs. 2006. *IRIN News*. Available at http://www.irinnews.org/report.asp?ReportID=51559&SelectRegion=Middle_East&SelectCountry=IR AQ, accessed 25 June 2008.

⁴⁹Al-Rubai'i, Sahib. 1999. *The Crisis of The Tigris and Euphrates Valleys and the Contrast between Waters and Desertification*. Damascus, Dar Al-Hasad For Printing, Publishing and Distribution, at p.54. also Turkish, Syrian, Iraqi dispute over water, Fertile Crescent Region Analysis. 1997. *Arabic News*. Available at <http://www.arabicnews.com/ansub/Daily/Day/971208/1997120807.html>, accessed 12 February 2008.

inevitable between Iraq and its co-riparian States particularly Turkey. So, there is a need to emphasise on the role of international law to strengthen the legal framework for managing transboundary waters.

As for the need for a doctorate research in this field, some observers argue that water scarcity is not only the water problem in the Middle East, but there are greater problems such as lack of institutional and legal framework to determine how cooperation is institutionalised.⁵⁰ Accordingly it is imperative to identify how and under what conditions cooperation can occur in the TERB region. While it is true that water is the central issue for the riparian States, the researcher believes water became subordinate to political issues such as the Kurdish problem. During the process of information collection and data analysis it was increasingly evident that legal analysis at the TERB level is extremely important to the riparian States as most of the key writers in the field have diverted their discussions to hydropolitical issues rather than exact legal issues. Some of the writers are implicit about the legal positions of the riparian States, probably trying to avoid controversial issues or due to the lack of updated data from the riparian States. Thus, very little updated legal analysis of the TERB has been made, which encouraged the researcher taking the key role and contribute to the field from the assumption that the rules of international law as one of the strongest mechanisms can support Iraq's legal entitlement to waters from the TERB.

⁵⁰ Jägerskog, Anders., 2003. *Why states cooperate over shared water: The water negotiations in the Jordan River Basin*. Sweden, Linköping University, Linköping, at pp. 20-21.

1.6 Thesis Methodology and Analytical Framework

Considering the current the situation in Iraq, the contributions pursued by this thesis should have been initially prioritising the focus on the national water law and policy inside Iraq rather than the role of international water law to Iraq's joint use of water from the TERB. However, researches on water law and management at national level for a country like Iraq are not presently viable within a framework of one thesis.⁵¹ This is due to a number of factors related to internal security situations and the reluctance of government departments to share data, an attitude inherited from the previous regime. However, the researcher undertook vigorous research to obtain information from all possible channels and public domains such as relevant treaties, academic books, articles and reports from both governmental and non-governmental organisations (hereinafter the NGOs) to daily news reports.⁵² Although interviewing individuals whose expertise is on this region could provide a significant input to this thesis, it not viable or a complicated task to undertake due to involving factors like security issues, travelling abroad and limited financial resources.

In forming the thesis methodology, the choice of a research strategy depends on the purpose of the study, because it will guide to the information to the interested

⁵¹ The researcher had difficulties to effectively partake, research and contribute to the field directly. The researcher had tried his best to obtain some information from the Iraq's water ministry officials for the cause of the current thesis while attending the World Water Forum 5, held in Istanbul, Turkey, from March 16th to 22nd 2009. The researcher was told that all these information are neither subject to the access in public domains nor are they available for academicians and researchers to view. The reason was that they must be kept confidentially since most of them are connected to political deals.

⁵² The national water management, law and policy can, sooner or later, be improved and standardised if two barriers are removed. The first barrier is the improvement of security nationwide, which only a synopsis of it is given in this thesis. The second barrier is the water supply to Iraq. As it is known that Iraq receives water mainly from the TERB, it is reasonable to argue that advocating Iraq's right to water under the international water law becomes more imperative at the time of writing this thesis. While some comparative legal analysis is pursued in some areas of the thesis as a result of discussing applicable case studies from different parts of the world, the intention of the researcher is to mainly focus on the TERB.

individuals.⁵³ In the current thesis, the researcher investigates what rights and obligations of the riparian States of the TERB should be subject to under international law, and to identify the Iraq's legal rights to the joint use of water subsequently. In other words, it is an analysis that focuses predominantly on international water law, but also how cooperation can be achieved in this part of the world as an outcome. Moreover, the thesis draws on the discipline of international law and international water law background, which enriches the theoretical framework for the thesis and supplements it with perspectives from both legal and theoretical studies. Thus, this kind of research needs to employ 'qualitative approach'⁵⁴ within a 'case study'⁵⁵ technique⁵⁶ that will be applied in this thesis. Moreover, it is argued that in the qualitative case study one will gain in terms of in-depth knowledge and lose in terms of the possibility of making generalisations.⁵⁷

As to the accuracy of the available information or sources searched for this thesis, it should be noted that most of the information the researcher has gathered or received from the respondents were written in English language. Some documents were

⁵³ Jägerskog, *Supra*, footnote 50, at p. 24.

⁵⁴ Key regards qualitative research as a generic term for investigative methodologies which can bring emphasis on the enquiry at variables in the natural setting in which they are found. Key, James P., 1997. *Research Design in Occupational Education*. Oklahoma State University. Available at <http://www.okstate.edu/ag/agedcm4h/academic/aged5980a/5980/newpage21.htm> accessed 16 December 2009. This approach is frequently criticized for not allowing generalizations to be made, and this argument has some validity. However, other observers argue that 'generalisability' need not be a problem in qualitative research'. Still, if we contrast case study research with larger quantitative comparative studies there is an apparent trade-off between their respective advantages.

⁵⁵ Edson argues that 'qualitative enquiry' is a form of 'moral discourse' which means an attempt to understand ourselves in relation to the larger world. Sherman, Robert R. & Webb, Rodman B., 1988. *Qualitative Research In Education*. USA, Routledge, University of Florida, at p. 2. A case study is an intensive study of a specific individual or specific context. There is no single way to conduct a case study, and a combination of methods such as unstructured interviewing or direct observation...etc, can be used. Trochim, William M.K., 2006. *Research Methods Knowledge Base*, Web Center for Social Research Methods. Available at <http://www.socialresearchmethods.net/kb/order.php>, accessed 15 March 2009.

⁵⁶ *Ibid.*, Sherman, at p.4.

⁵⁷ *Ibid.*

translated information from both the Arabic and Turkish languages⁵⁸ while most writers who shared their expertise in the field are already native English speakers or able to communicate in English Language.

1.7 Scope of the thesis

In order to reach crucial elements in the process of the analysis and conclusion, it should be always recognised that water issue is inherently linked to other political issues such as ethnic minority issues. This issue can have a great impact on interstate relations of the States joint use the same water. For example Turkey and Syria have exchanged angry threats over the Great Anatolia Project (hereinafter ‘GAP’). When Syria realised that it is too weak relative to Turkey, to balance the situation directly, Syria has given sanctuary to guerrillas of the Kurdish Workers Party (hereinafter the PKK), which has long been waging an insurgency against the Turkish government in eastern Anatolia. From the view of the Turkish government, Syria might be exploiting the PKK’s position to gain leverage in bargaining over Euphrates water. As a result, in October 1989, the Prime Minister Turgut Ozal suggested that Turkey might impound the rivers water although he later retracted the threat.⁵⁹ If Syria had not restrained the PKK’s activities, the tensions between the two States would not have been calmed so easily. Wolf argues that international law only concerns itself with the rights and

⁵⁸ The researcher can communicate in Arabic language, but the security situation in Iraq has impeded the researcher’s capability in obtaining original text from the Universities, libraries and the departments concerned in Baghdad for the downstream State. Moreover, the researcher cannot communicate in Turkish language, therefore, the preferred information gathered from the Turkish Writers are mostly written in English language, such as Kibaroglu, a prime academic writer in the field.

⁵⁹ Homer, Dixon & Thomas, F., 1999. *Environment, Scarcity, and Violence*. USA, Princeton University Press, at p. 140. Available at <http://site.ebrary.com/lib/dundee/Doc?id=10035907&ppg=151> accessed 15 May 2009.

responsibilities of States, which makes some political entities who might claim their water rights are not represented,⁶⁰ such as the Kurds along the Euphrates.

Despite the above, hydropolitical issues do have some probative value to water issues in the region, the researcher avoids discussing any particular ethnicity's right to water because they are considered as issues related to non-sovereign entities, that if considered, it might directly prejudice the main thesis hypothesis which is all about the application of international law. Therefore, Kurdish and other specific population rights will not be addressed unless it is necessarily relevant. The thesis will rather consider the people of the region as a whole, because water should be shared by every human being without favouring any race or nation.

It is worth mentioning that the thesis also in part provides some historical background of water related issues in the region, as well as an account of the process of implementation of the water related parts of the respective agreements between the riparian parties of the TERB.

1.8 Chapters of the Thesis

After a short introduction in chapter One, a general literature review about the origins of river basin development is presented so as to focus on the thesis issue. The thesis issue was followed by the thesis question, objectives, justifications, methodology, scope and the outline of the thesis.

Chapter Two highlights the three riparian States' need for water in connection to their uses of the TERB. The chapter will discuss the physical characteristics of the TERB

⁶⁰ Wolf, *Supra*, footnote 5, at p. 254.

such as the hydrography and geography of the TERB. The chapter then examines the riparian States' development projects on the TERB more specifically analysing the economic impacts of the GAP in Turkey, followed by the environmental impacts of the GAP to the lower riparian States with particular attention to the social impacts by the GAP in Turkey. Before the conclusion of the chapter, there is a section which describes the reality of the new Iraq due to the invasion, including three issues of Iraq's internal water problems, water quality and the status of the agriculture sector in Iraq will be addressed.

Chapter Three discusses transboundary water issues in TERB region under current international water law which is the main literature chapter of the thesis. The chapter makes a distinction between the application of international relations in comparison with the application of international law. The importance of this chapter is to demonstrate that although the former could have direct influence on transboundary water management, the latter can be a direct force if the riparian States seek to a long-lasting solution to the problem. In this context, the chapter will firstly address issues around water conflicts in the Middle East, such as water scarcity, food and energy security issues. Next, it will define the theories of conflict and cooperation. Besides the definitions of those two theories, types of conflicts over water resources will be discussed. Later on, cooperation under international politics will be analysed in detail through applying hegemony, hydro-hegemony and balance of power theories. Finally, the importance of the application of international law to the balance of power theory will be conferred.

Chapter Four covers the application of international law to the riparian States. This chapter is the core chapter of the thesis. It endeavours to identify the rights and

obligations of the riparian States under international law. It starts with the definition of international law, and the requirements pertaining to subjects of international law. Also, it will examine the status of sovereignty of Iraq after the US-led invasion. Secondly, as the main task of the chapter, it will identify what States' rights are under international law by means of examining State's rights of sovereignty, independence, legal equality and peaceful coexistence. In the same way, States' obligations under international law will be identified by the means of States' obligations of self-discipline, peaceful dispute settlement and cooperation. To regulate both States' rights and obligations under international law, there is a necessity to refer to the sources of international law that will be under subheadings; treaty, international custom, general principles of law and judicial decision and juristic opinions.

Treaties will be defined and the role of treaties elucidated; when States are bound by a treaty and treaties that are not entered into force yet will also be addressed. Next, the chapter will analyse the formation of international custom and its elements, State practice and *opinio juris*. Lastly, the chapter will discuss the enforcement of international law, including the distinction to be made between international agreements of (general) nature and international agreements of (particular) nature, and the function or importance of international law. Under the enforcement section, particular agreements made between the riparian States and the reasons for which they were not successful in terms of regulating their interstate relationships will be discussed.

Chapter Five is another core chapter of the thesis, mainly about the application of customary international water law to the TERB. The chapter will start with introducing the work of the International Law Commission (hereinafter the ILC) on

the Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter the UNWC 1997), and then focuses on the application of the UNWC 1997. In doing so, the chapter will examine the scope of the UNWC 1997, substantive norms such as equitable and reasonable utilisation, obligation not to cause significant harm, obligation to inform, consult and engage in good faith negotiation, followed by the implementation instruments and dispute settlement mechanisms in relations to the riparian States of the TERB. Finally, the issue of the Turkish persistent objection to the UNWC 1997 in relation to its treaty practice will be considered, which will lead to the posing arguments for the competency of the UNWC 1997.

Chapter Six is the thesis' analysis chapter, and identifies the legal positions of the riparian States of the TERB. Later, considerations by the Turkish, Syrian and Iraqi governments to the TERB will be separately discussed. In addition, compliance of international obligations and the application of *lex lata* and *lex ferenda* will be discussed in order to show that equitable utilisation, no significant harm, procedural rules and dispute settlements are the main keys to determine legal positions of the riparian States under the customary international water law.

Chapter Seven will discuss the proposal of establishing the TERB Commission. This chapter is based on the main findings of the previous chapters. This chapter is more than a recommendation Chapter, it includes more detail than a mere recommendations because it discusses the importance of independent technical and legal committees to the management of the TERB. In this chapter, subjects like States' relationships, joint technical committee and treaty making will be discussed as a legal and institutional framework guideline for the riparian States' future management plans for the TERB.

Chapter Eight will be the conclusion of the thesis, re-emphasising the conclusions conveyed in all chapters, and followed by recommendations with the expectation of bringing the intended contribution to the knowledge in the field.

CHAPTER TWO

WATER USES WITHIN THE TIGRIS AND EUPHRATES RIVER BASIN

2.1 Introduction

As the thesis is about Iraq's joint use of water from the Tigris and Euphrates Rivers with Turkey and Syria, this chapter will discuss hydrographical structure of the TERB to support the discussions in the following chapters. The information provided in this chapter describes the physical and environmental context of the TERB and shows how the TERB is used by all the riparian States through examining the physical characteristics of the TERB, how the GAP affects the downstream riparian States' use of the TERB, and the status of water resources in Iraq since 2003 US invasion.

In this chapter, the proportion of the TERB that extends into the territory of each riparian State will be examined, and the physical and social geography of the TERB will be presented. Subsequently, the chapter will provide hydrological details of the TERB, in terms of water availability, variability, quality and contribution of water to the TERB by each riparian State. Finally the impacts of existing water uses on the downstream riparian States of the TERB will be assessed.

It is notable that from the 1970s onwards, the three riparian States have pursued large-scale irrigation and hydropower projects within the TERB.¹ With the commencement of these large-scale projects, it is suggested, water has become a source of discord between the riparian States of the TERB. The rapid implementation of GAP by Turkey has

¹ Tomanbay, Mehmet., 2000. Turkey's Approach To Utilization Of The Euphrates And Tigris Rivers. *Arab Studies Quarterly*, 22(2), at p. 1. Available at http://findarticles.com/p/articles/mi_m2501/is_2_22/ai_65653665/pg_1?tag=artBody:col1, accessed 17 June 2008.

exacerbated this discord.² It is the insufficiency of available water resources to sustain rapid population growth and industrialisation, coupled with pollution that has brought to the forefront the problem of water scarcity.³ Thus, some studies suggest that Turkey, with its snowy mountains and climate characterised by relatively abundant precipitation, holds the key to the solution for the Middle East water shortages.⁴

2.2 Hydrographical context of TERB

Both the Tigris and the Euphrates Rivers are the longest rivers in Southwest Asia that extend beyond more than one State. Under this section, the general physical and geographical nature of the TERB will be described, together with details of the length and flow contributions to the TERB within each riparian State, and details of the availability, precipitation and evaporation of water in the TERB will be given. However, only surface water will be regarded and transboundary groundwater like the groundwater between Turkey and Syria will not be considered.⁵

Regarding the nature of the TERB, Kliot mentioned that both the Tigris and the Euphrates rivers are international rivers shared by Turkey, Syria, Iraq and Iran, which have almost completely separate basins which unify only in their last 160 km at the Shatt al-Arab.⁶ Although both rivers originate in the mountains of eastern Turkey, within about 40 km of each other, they take completely separate paths until they meet in

² Ibid., at pp.1-2.

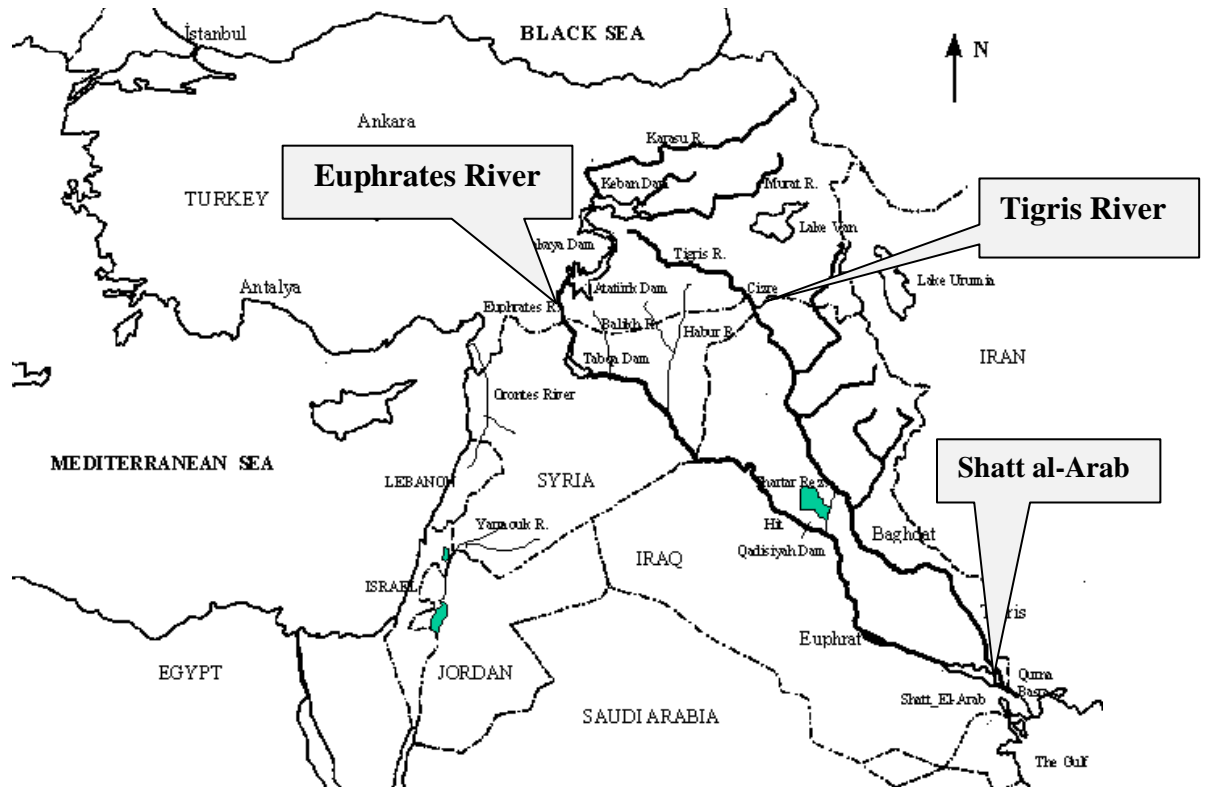
³ Challenges of Water Scarcity, A Business Case for Financial Institutions. 2005. *The United Nations Environment Programme Finance Initiative (UNEP FI) and Stockholm International Water Institute (SIWI)*, at pp. 10-19. Available at http://www.siwi.org/documents/Resources/Reports/Challenges_water_scarcity_business_case_study_2005.pdf, accessed 10 March 2009.

⁴ Ibid.

⁵ There is an international aquifers located in the border between Turkey and Syria, but they are little used to the present time. Sofer, Arnon & Copaken, Nina., 1999. *Rivers of fire: the conflict over water in the Middle East*. Rowman & Littlefield, at pp. 227-233.

⁶ Kliot, Nurit., 1994. *Water Resources and Conflict in the Middle East*. UK, Biddles Ltd, Guildford and King's Lynn, at p. 100.

southern Iraq to form the Shatt al-Arab and flow into the Persian Gulf.⁷ However, the Turkish government considers that the Tigris and Euphrates Rivers form one basin because of their integration in the Shatt-al-Arab waterway shortly before entering the Persian Gulf as will be discussed in the subsequent chapters. This consideration by Turkey will be further analysed in Chapter Six. See Figure 1 below.



Source: Klaas, Erwin E., 2003. Potential for Water Wars in the 21st Century. Presentation, 3 April. *The World Turned Upside Down*, Iowa State University. Available at <http://www.public.iastate.edu/~mariposa/waterwars.htm>, accessed 20 May 2010.

Figure 1: Map of Tigris and Euphrates River Basin (Modified)

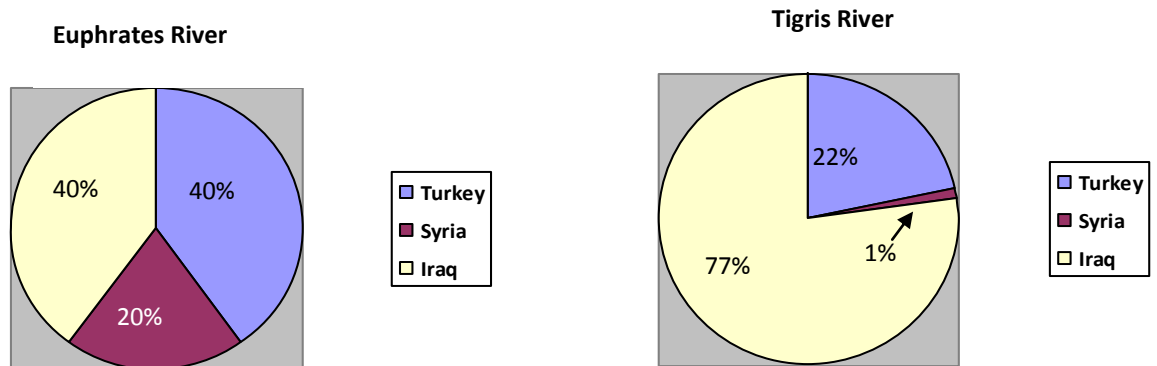
The Tigris River is 1840 km length, of which only 22% is through Turkey, 1% through Syria and 77% through Iraq. However, due to its natural catchment distribution, the river receives 53% of its water from Turkey, while the remaining 47% of the Tigris'

⁷ From the confluence of the Euphrates and Tigris rivers up to the Persian Gulf the river is known as Shatt al-Arab.

water comes from western Iran and Iraq.⁸ There is no contribution of water from Syria to Tigris River.

The length of the Euphrates on the other hand is 2700 km, 40% of this length runs through Turkey, 20% of the through Syria, and another 40% through Iraq. The Euphrates River receives between 88% and 90% of its water from Turkey⁹ and the remaining 10% to 12% comes from Syria;¹⁰ Iraq's contribution to the river is nil. See Figures 3 and 4 below.

Figure 2: **Length of Tigris and Euphrates River Basin in each riparian State.**

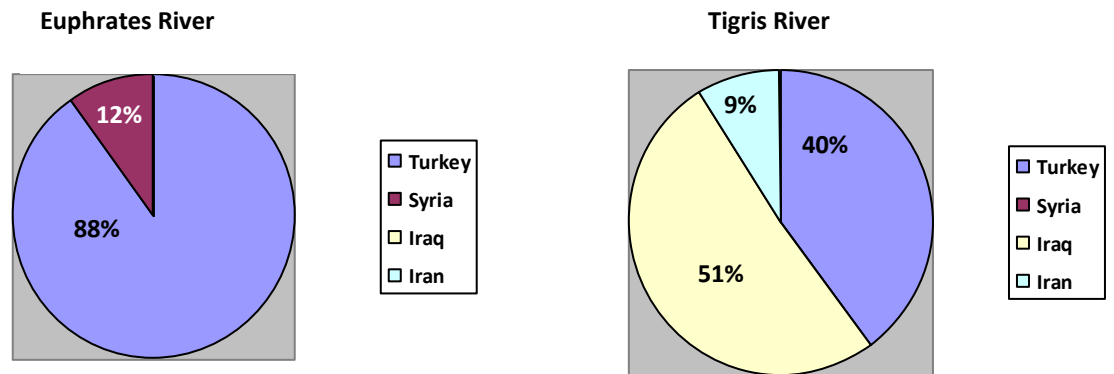


⁸ Iran's contribution is between 5.9% and 16%, while the rest comes from Iraq. Altinbilek, Dogan., 2004. Development and Management of the Euphrates-Tigris Basin. *Water Resources Development*, Éjjk Carfax Publishing 20(1), at p. 19. Available at <http://classshares.student.usp.ac.fj/GE203/2007/informal%20sector/conflicts/Development%20and%20management%20in%20the%20Tigris%20Basin.pdf>, accessed 28 May 2009. also Kliot, Nurit., 2002. *Water Resources and Conflict in the Middle East*. London: Routledge, at p. 115. The long-term average annual natural flow of the Euphrates is between 29 and 35 billion cubic meters (bcm) and of the Tigris is between 49 and 50 bcm.

⁹ Kolars argue that Turkey contributes 98 per cent of the water potentially carried by the river. According to the official estimates Syria contributes around 12 per cent of the total, however, as Kolars noted, 10 per cent of that 12 per cent originates from the northern tributaries, the Khabur and the Balikh, and both have their catchments in Turkey. The observed average annual flow across the Turkish Syrian border is 29.8 bmc. The natural flow of the river can be given as 33.4 bmc annually. No other tributaries flow into the Euphrates after the Khabur, except in Iraq, where some of the Tigris' waters are added to the Euphrates. Kolars, John F. & Mitchell, William., 1991. *The Euphrates River and the Southeast Anatolia Development Project*. Southern Illinois University Press, at pp. 87-89.

¹⁰ This 12% is a disputed figure, since some of the water feeding Syrian tributaries comes from Turkish aquifers. Recently Turkey increased its consumption from these aquifers and consequently the springs feeding the Euphrates tributaries within Syria are drying up. The existence of these aquifers along the international border has led some to argue that Turkey contributes about 98% to the Euphrates. Altinbilek, *Supra*, footnote 8, at pp. 19-22.

Figure 3: **Annual Contributions to the Tigris and Euphrates River Basin by the riparian States.**

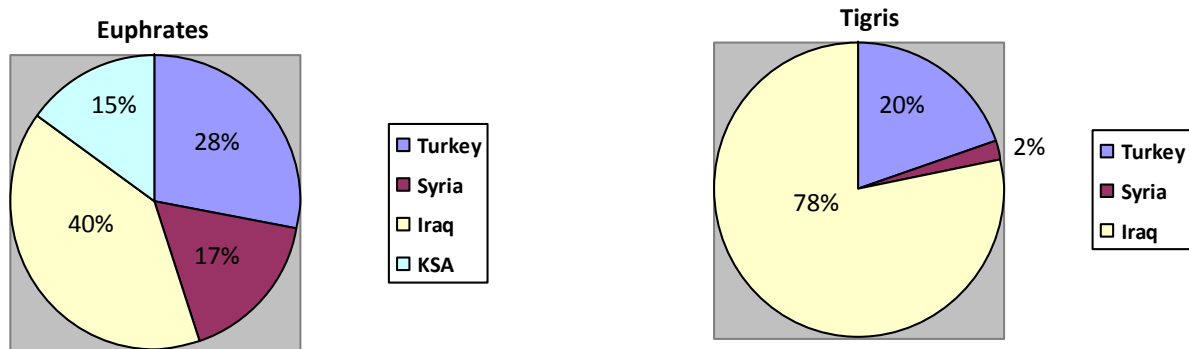


The Tigris River flows through Turkey until the border city of *Cizre*; from there, it forms the border between Turkey and Syria for 32 km, then crosses into Iraq at *Faysh Khabur*. Within Iraq, it gathers several tributaries such as the *Greater Zap*, the *Lesser Zap*, the *Adhaim*, and the *Diyala* from the Zagros Mountains to the east. The Euphrates River enters Syrian territory at *Karkamis*, downstream from the Turkish town of *Birecik*. It is joined by its major tributaries, the *Balik* and *Khabur*, as it flows southeast across the Syrian tablelands before entering Iraqi territory near *Qusaybah*. As the abovementioned details show, Turkey is the upstream co-riparian State, and the main controller of both the Tigris and Euphrates Rivers, while both Syria and Iraq are the downstream co-riparian States. Furthermore, Syria becomes the midstream co-riparian State as far as the Euphrates River is concerned because it is located between the Turkey and Iraq, and therefore, Iraq becomes the extreme downstream co-riparian State of the Euphrates River.

There is some controversy over the drainage area of the TERB due to disagreement on the length of the Tigris River and the share by each co-riparian State. However, this

thesis uses the most accurate data. The Tigris River drainage area is measured to be 235,000 km², of which 105,750 km², about 45%, is in Iraq. However, according to Dolatyar, and Gray, Iraq's share of the Tigris is 78%, Turkey's share is 20% and Syria's share is 2%.¹¹ See figure 4 below, which is according to Dolatyar's claim.

Figure 4: The drainage area of Tigris and Euphrates River Basin in each riparian States



The drainage area of the Euphrates is widely accepted to be 444,000 km². However, the share by each co-riparian State is disputed. Some authorities put the Turkish share at 28%, with Syria at 17%, Iraq 40% and Saudi Arabia 15%. See the above figure 5. Others apportion the relative shares according to the length of the river in each country.

The flow of both Rivers is characterised by high annual and seasonal variability. The average flow for Tigris River is 520 m³/s at the border between Turkey and Syria, which

¹¹ Dolatyar, M. & Gray, T.S., 2000. *Water Politics in the Middle East: A Context for Conflict or Co-Operation?* Macmillan Press, Basingstoke, at p. 121. also Downstream Impacts of Turkish Dam Construction on Syria and Iraq: Joint Report of Fact-Finding Mission to Syria and Iraq. 2002. *Kurdish Human Rights Project, The Ilisu Dam Campaign The Corner House*, at p. 4. Available at <http://www.thecornerhouse.org.uk/summary.shtml?x=536598>, accessed 17 May 2010.

is about 16.2 billion m³/year.¹² The lowest flow was 9.6 billion m³ in 1973, and the highest was 34.3 billion m³ in 1969. Meanwhile flow in April is normally about 1433 m³/s, while the driest month is September at a flow of 113 m³/s. According to the General Directorate of State Hydraulic Works (hereinafter the 'DSI'), the average annual flow of the Tigris at Cizre in 2005 was 16.6 billion m³/a in which more than half of the flows occur during the wet season, essentially between March and May.¹³ When the river reaches the middle part of Iraq, around Baghdad, the average flow becomes about 1236 m³/s,¹⁴ or 39 billion m³/a, of which 55 % originates from tributaries in Iraq. As to the Euphrates River, its actual annual volume can reach 35.9 billion m³/a, according to the official reports.¹⁵

The average annual discharge of the Euphrates is 32 billion m³/a. As for the Tigris and its tributaries, the average annual discharge is 50 billion m³/a. Such a quantity is said to be fairly enough for vital needs of the three riparian States.¹⁶ Yet, during the technical negotiations the riparian governments declared their needs from both rivers, which indicated that total demand of the three riparian States far exceeds the supply of each river especially in the case of the Euphrates.¹⁷ Hence, there is a mismatch between supply (average discharge) and demand for water from the TERB. Moreover, the Rivers have extremely high seasonal and multi-annual variance in their flow. The natural flow

¹² This figure can be various from one year to another. For example, if in year 1 we get 520 m³/s, the annual flow will be over 16.3 billion m³/y. This calculation is made by the researcher as follows: 60 seconds X 60 minutes X 24 hours X 365 days = 31.536.000 X ~520 m³/s= 16.398.720.000 m³/year

¹³ Ilisu Consortium, Ilisu Dam and HEPP. 2005. *Environmental Impact Assessment Report*. Available at http://www.dsi.gov.tr/ilisu/ilisu_ced_eng_ek1.PDF, accessed 19 December 2009.

¹⁴ Williams, Philip & Associates. A Review of the Hydrological and Geomorphic Impacts of the Proposed Ilisu Dam, Report for the Corner House, San Francisco. in *Downstream Impacts of Turkish Dam Construction on Syria and Iraq: Joint Report of Fact-Finding Mission to Syria and Iraq*. 2002. Kurdish Human Rights Project, The Ilisu Dam Campaign. The Corner House. Available at <http://american.edu/TED/ice/tigris.htm>, accessed 19 March 2008.

¹⁵ Ibid.

¹⁶ Tomanbay, *Supra*, footnote 1, at pp. 1-2.

¹⁷ Kibaroglu, A., 2002. *Building A Regime for the Waters of the Euphrates-Tigris River Basin*. London, Kluwer Law International, at p. 70.

of the river passing from Turkey to Syria and from Syria to Iraq does change due to irrigation and energy projects that the riparian States have already initiated. The rapidly increasing populations of these countries and the importance given to agricultural development and food production necessitate further utilisation of the TERB.¹⁸ The scarcities in these major river basins of the Middle East constitute the background of the transboundary water politics in the region, which is analysed below through consecutive historical episodes in the 20th century.¹⁹

As to the relative irrigable land area between the riparian States, according to Tomanbay, Iraq has a larger irrigable area than Syria, but through the dependence on the canals like *Thartar* Canal which link the Euphrates and the Tigris, Iraq may have the option of using water from the Tigris for irrigation, instead of from the Euphrates; water which would otherwise flow unutilised.²⁰ Consequently, a transfer of water from the Tigris to the Euphrates is considered as a method to alleviate the water shortage in Iraq. Furthermore, as is the case with Syria, most of Iraq's land is low-lying and afflicted by deposits of gypsum and salt. A large portion of the Iraqi territory rarely exceeds 300m elevation, with only 15 percent reaching as high as 450 m. This topography limits Iraq's ability to impound the waters of the Euphrates behind high dams; consequently, they empty into the Gulf without being put to use.

In the Turkish territory, an area of nearly 2.5 million hectares were expected to be efficiently irrigated from the Euphrates and the Tigris within the scope of the GAP, due to 67 % of good land quality that would benefit from efficient irrigation. It is suggested

¹⁸ Kibaroglu, A., 2008. The Role of Epistemic Communities in Offering New Cooperation Frameworks in the Euphrates-Tigris Rivers System. *Journal of International Affairs*, 61(2), at p.183.

¹⁹ Kibaroglu, A., 2007. Politics Of Water Resources, In The Jordan, Nile And Tigris-Euphrates: Three River Basins, Three Narratives, Perceptions. Available at http://www.sam.gov.tr/perceptions/volume12/Spring07_Aysegul_Kibaroglu.pdf, accessed 12 March 2009.

²⁰ Tomanbay, *Supra*, footnote 1, at pp.22-23.

that an area of 1,796,568 hectares of land can be efficiently irrigated from the Euphrates, and not from the Tigris, within the scope of GAP. The area Turkey plans to irrigate from the Euphrates within the scope of GAP is 1,091,203 hectares. Given these facts, a comparison of the surface areas to be irrigated by Syria and Turkey from the Euphrates would be useful. The good quality land which, though irrigable from the Euphrates, is not included within the scope of GAP irrigation schemes is 705,365 hectares.²¹

In Syria, as indicated, the total area irrigable from the Euphrates is 482,000 hectares, which is only 0.77 % of its irrigable land of which a good part is already under irrigation. As it can be seen from these figures, Turkey's claim on water for irrigation is stronger since it has approximately four times more irrigable land than Syria which can be irrigated from Euphrates. It is estimated that Turkey has almost seven times more irrigable land than Syria if the entire Basin region is taken into account.²²

As to the case for Iraq, according to the official statement from the University of Michigan, Iraq's irrigable lands is estimated to be about 1,950,000 hectares, while according to John Kolars, Iraq's irrigable land is only about 1,290,000 hectares.²³ However, if an average between the two estimations, 1,620,000 hectares, is used, the amount of the irrigable land in Iraq is relatively close to that of Turkey. If the security situation in Iraq stabilises, and the new government inaugurates developing the agriculture sector, then upon new researches and technology, the data for irrigable land

²¹ Ibid., at p. 3.

²² Water: A source of conflict of cooperation in the Middle East? A Scramble for Water Resources is under way in the Middle East. Available at <http://web.macam.ac.il/~arnon/Int-ME/water/Euphrates-Tigris%20Basin.htm>, accessed 11 March 2009.

²³ Kolars, John F., 1993. Problems of International River Management: The Case of Euphrates. *Papers from the Middle East Water Forum*. Cairo, at p.49. Available at <http://www.sam.gov.tr/perceptions/Volume1/June-August1996/WATERISSUESBETWEENTURKEYSYRIAANDIRAQ.pdf>, accessed 11 January 2010.

in Iraq may show that Iraq has a greater irrigable land than in Turkey. This puts Iraq in a more controversial position when negotiating on its joint shares of the TERB with Turkey and Syria on the grounds of the equitable utilisation principle. See Figure 5 below.

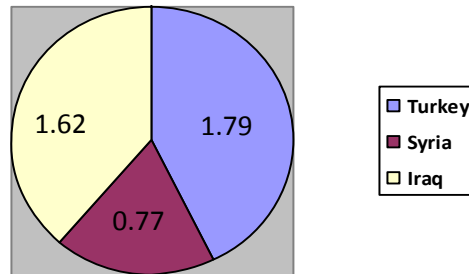


Figure 5: **Lands irrigable from Euphrates flows (million hectare)**

It is noteworthy that these very general data provide some bases for rational and reasonable use of the Euphrates by the riparian States. Yet, according to Kolars, Syria has been criticised or claiming a portion of the Euphrates flow even though the barren land within its territory is not irrigable and the water would flow through its territory with no significant benefit.²⁴ Although Syria's claim is not accepted by the upstream State of Turkey, the Syrian claim has more merits in the case of Iraq. The reason is that Iraq demands a flow which can satisfy the irrigable lands that Tigris River alone cannot serve.

Interestingly, official data given by the riparian States to non-governmental firms and organisations are inconsistent on the total irrigation project areas fed by the Euphrates. Such inconsistent data misleads analysts²⁵ attempting to determine how much water exactly is needed by any riparian State. For example, various sources have stated that

²⁴ Ibid.

²⁵ Ozden Bilen., 2009. *Turkey, and Water Issues in the Middle East*. (3rd Edition). Ankara, DSI Printing House, at pp. 48-49.

the actual irrigation coverage planned by Syria range from as low as 400.000 to 1 million hectares, but the final estimations shows a total coverage between 400.000 and 800.000 hectares. Thus, if irrigable land in Syria is taken to be 400.000 hectares, and assuming that the production of one tonne wheat needs 1200 m^3 , as Bilden argues, then the total water consumption needed is 4.8 bm^3 , however, when Syria claims 773.000 hectares of irrigable land, it means 9.3 bm^3 is required.²⁶ If that is the case for Syria which is relatively in a better position in terms of security and developments compared to Iraq, it can be argued that the scenario for Iraq would be worse on the grounds of nearly three decades of war and devastation that will be mentioned in this chapter.

2.3 Water development projects in TERB region by the riparian States.

Kliot suggested that major projects on the TERB were carried out between 1960s to late 1980s while some are still under construction. For Kliot, lack of coordination among the riparian States, and competition over the Euphrates River in particular, has increased the need for integrated planning of the TERB particularly when realising that the main objective of building those dams were for multipurpose water projects such as irrigation, flood control, water storage and hydro-electricity.²⁷ Although the purposes behind these projects are similar in each riparian State, the lack of coordination has led each State to prioritise their own interests rather than considering the interests of the TERB as a whole. Table 1 below shows the completion of dam construction projects over the Euphrates River by the riparian States. One important matter is the large storage capacity issue. Each riparian State prefers to develop water storage capacity within their own territory instead of sharing the TERB water resources. Thus, Turkey has accumulated for itself a storage capacity of 90 to 100 billion m^3 with *Keban*,

²⁶ Ibid., at pp. 45-47.

²⁷ Kliot, *Supra*, footnote 6, at p. 120.

Karakaya and *Ataturk* dams. Syria has developed a capacity of 12 billion m³, while Iraq has a storage capacity of 100 billion m³. However, it is suggested that the Euphrates Rivers does not have such a capacity to fill all the present and planned reservoirs, and the 1974, 1988 and 1989 drought years experiences showed that each Turkey and Syria have preferred to follow their own self interests by filling their own reservoirs instead of sending the water downstream to Iraq.²⁸

The year 2008 was considered as another severely dry year in the whole Middle East. That year was regarded as a year of drought and sand storms across Iraq that has devastated the country's crucial wheat crop and created new worries about the safety of drinking water. The dry weather has even affected Kurdistan's wheat fields in northern Iraq to pomegranate orchards, orange groves and wheat fields just north of Baghdad.²⁹ To reduce the adverse effects of such a dry year on Iraq, the Iraqi government has opened talks with Turkey and Syria with the ambition to increase the flow of the Euphrates and alleviate Iraq from severe water shortages.³⁰ Nevertheless, there is no guarantee that in future drought years, Turkey and Syria will not prioritise their own interests before considering the water resource needs of Iraq.

Another important feature of these reservoirs is the amount of water lost due to evaporation. The potential water losses for all the reservoirs in Turkey are estimated at 1.5 to 2.0 billion m³ per year; the 630 million m³ per year water loss estimated for the *Tabqa* Dam represents about 2% of the annual flow of the Euphrates. However, water

²⁸ Ibid.

²⁹ Drought threatens Iraq's crops and water supply. 2008. *US Today Website*. Available at http://www.usatoday.com/news/world/2008-07-10-iraq-drought_N.htm, accessed 12 February 2009.

³⁰ Water Resources Minister Latif Rashid is heading to Turkey and then to Syria with an appeal from Prime Minister Nuri al-Maliki to increase the amount of water released into the two rivers, the government said in a statement. Iraq in water talks with Turkey, Syria as rivers run dry. 2008. *The Raw Story*. Available at http://rawstory.com/news/afp/Iraq_in_water_talks_with_Turkey_Syr_05272008.html, accessed 30 July 2008.

loss in Iraq is much higher than Turkey and Syria. It is estimated to be about 4.79 billion m³ per year from the evaporation calculations at *Haditha* Dam, Lake *Habbniya*, *Abu Dibbis* and *Tharthar* which are located in regions of high evapor-transpiration.³¹ In fact, Iraq loses 7% of water from the Tigris River and 8.5% from Euphrates through evaporation.³² That is equal to 15.5 % of the total amount of water lost in Iraq from the TERB.

Despite the above significant factors and water problems between the riparian States, Turkey has bright additions to the struggle for the water. Turkey established the GAP in the early 1980s which, once completed, will cause Syria and Iraq to face more serious water shortages. The following section will discuss the economic and environmental impacts of GAP on the riparian States.

2.4 Economic benefits of GAP to Turkey

According to the claims made in Turkey and by Turkish writers, the main objective of the GAP is to reduce regional economic inequality between the western and the underdeveloped southeastern areas of Turkey by mobilising regional resources, increasing productivity and creating employment opportunities for the local people.³³ The ultimate aim of increasing per capita income is to encourage political and social stability in the region.³⁴ Southeast Anatolia is the third largest agricultural region in Turkey, with a total land area of 7.4 million hectares, of which 40% is under cultivation.

Currently 129,740 hectares are under irrigation and 2,628,700 hectares are so-called

³¹ Klot, *Supra*, footnote 6, at p.122.

³² *Ibid.*

³³ *Ibid.*

³⁴ The GAP region comprises nine provinces which are: Gaziantep, Diyarbakir, Sanliurfa, Mardin, Adiyaman, Batman, Kilis, Sirnak and Siirt, in which the project covers an area of 74,000 km². Sahan, Emel, Zogg, Andreas & Mason, Simon A., 2001. Sustainable Management of international Rivers Case-Study: Southeastern Anatolia Project in Turkey–GAP. *Seminar for Doctoral students at the ETH Zurich, Swiss Federal Institute of Technology, Zurich*, at pp. 5-12.

‘rain-fed agriculture’. However, agriculture is not highly mechanised in this area.³⁵ To support the economic benefits of the area, the GAP includes plans for irrigation and domestic water supply and hydroelectric energy plants. Seven projects are located in the Euphrates river basin and six are in the Tigris river basin. It is expected that on completion, the GAP will regulate 28% of Turkey’s total water potential and enable 1.7 million hectares to be irrigated, approximately 50% of the total irrigated area in Turkey. Economic development in the region is expected as a result of improved irrigation so that the region can contribute to, rather than be a burden on, the national economy. The objective is to encourage commercial farming in order to develop the production of cash crops and agro-industries, such as food processing for export.

Within the GAP, two major dams *Karakaya* and *Ataturk* together generate a considerable share of electricity entering into the national grid system.³⁶ The monetary value of energy generated by *Karakaya* and *Ataturk* dams is equivalent to 9.3 billion US Dollars, which in terms of alternative sources of energy, can correspond to the fuel importation of 38.8 million tons of oil or 30 billion cubic meters of natural gas.³⁷ The total population of the region is 5.2 million – 9.2% of the total Turkish population according to 1990 census. Urbanisation has been rapid in recent years and 56% of the population live in urban areas. The fertility rate in the region is high at 5.7%, compared with the national average for Turkey of 3.4%.

³⁵ Southeastern Anatolia Regional Development Administration. *GAP website*. Available at <http://www.gap.gov.tr>, accessed 20 June 2008.

³⁶ Koyun Ahmet. & Anabilim, Dal., 2007. Termodinamik Turkey-National study, Mediterranean and National Strategies for Sustainable Development Priority Field of Action 2: Energy and Climate Change Energy Efficiency and Renewable Energy. *Sophia Antipolis*, at p.10. Available at http://www.planbleu.org/publications/atelier_energie/TR_National_Study_Final.pdf, accessed 22 May 2009.

³⁷ Sahan, *Supra*, footnote 34. However, nowadays, the price of oil is much higher than what was in the past eight years which five times higher. Also, the value of the US Dollar is much lower than of eight years ago. Therefore, the above number of US Dollar vis-a-vis oil and natural gas prices is varied and might not be accurate. Yet, the economic contributions brought by the mentioned dams are immense for the Turkish Government.

The GAP project was scheduled for completion in 2010, but this deadline has now been extended due to financial problems. Former State Minister Salih Yildirim has stated that the economic steps do not fit the regional realities and several mistakes have been made in determining the priorities of the region. He has pointed out that “politicians put their political calculations before the realities in the region”. Table 2 below exhibits the nature of the projects of each dam on both the Tigris and Euphrates Rivers.

Up until the 56th Turkish government,³⁸ eight economic plans had been put in place for the GAP. In these plans some important goals were set forth,³⁹ and were reached on time.⁴⁰ This plan was particularly laid down after Ocalan, the leader of the PKK, was arrested the government tried again to give more importance to the GAP by implementing economic measures for the development of the region.

2.5 Negative impacts of GAP on the riparian States

Other than the prospective economic benefits of GAP for Turkey, it is imperative to discuss GAP’s negative impacts on the riparian States. Without detailed discussions on the environmental impacts of the GAP to the riparian States, this section will only focus on declining water quality due to erosion, salinisation, sedimentation and wastewater for the downstream States, then discussing impacts on the archaeological places and the social life within Turkey. The justifications for not discussing environmental issues in details come from the fact that most of the environmental damage in Iraq was due to the two decades of wars and economic sanction imposed on Iraq. Next, there are no clear

³⁸ The 58th Turkish Government was elected in 2002. Office Of The Prime Minister, Directorate General Of Press And Information. *Turkish Press Review*. Available at <http://www.byegm.gov.tr/YAYINLARIMIZ/CHR/ING2003/03/03x03x11.HTM>, accessed 22 June 2008.

³⁹ Such as to ameliorate the adverse conditions in this region, to support the unfinished construction of projects, to speed up the financing and development of resources, to improve the private sector, to give low interest credit to investors, to support the return of the people to their own villages, to give free land to the companies that employ more than 10 people, and not to tax companies that have employees for three years or more. However, these goals are not the central discussion of the thesis. Ibid.

⁴⁰ Ibid.

and reliable data to identify the how exactly the environment is affected by the GAP project, in which it is not completed yet, and how it will further causes environmental damage in the future when the project completes. Finally, brief relevant environmental impacts on Iraq's marshlands will be discussed in the next section. The total GAP area is 7.4 million hectares, of which 5.5 million hectares are affected by moderate to very intensive water erosion. According to Sahan, this area is steep volcanic terrain and erosion has been significant enough to expose underlying sub-soils and rock structure. Furthermore, an area of 4 million hectares now has a problem with this increased bedrock exposure. Farmers in the area still attempt to cultivate their land by removing the loose stones.⁴¹ The impact of erosion weakens the Turkish government's argument that they possess a better quality of irrigable land than Syria and Iraq, as will be discussed in Chapter Six,⁴² because this land may soon no longer be suitable for agriculture.

Next, because of inappropriate and excessive irrigation there has also been an increase in salinisation. In the *Harran* valley, part of the GAP area, 150,000 hectares is already suffering from aridity due to salinisation even though irrigated agriculture only started in this region in 1995.⁴³ Furthermore, the higher volume of salinity in the upstream watercourse created by human activity could seriously damage the agricultural land in downstream States.

The erosion in the upper reaches of the TERB has also caused sedimentation problems. For example 10% of the volume of the *Ataturk* Reservoir has been filled with sediment. However, complete sedimentation will take 500 years in this reservoir because of the

⁴¹ Sahan, *Supra*, footnote 34, at p. 7.

⁴² Chapter Six, *Infra*, heading 6.3.1 *Considerations by the Turkish Government.*, at p. 167.

⁴³ Sahan, *Supra*, footnote 34, at p. 8.

Keban and *Karakaya* dams which are located above the *Ataturk* dam. This differs from the sedimentation rate of other dams in Turkey, many of which only have a 50 year lifespan. Soil erosion, due to insufficient forest and vegetation cover, is also a problem in the GAP region. Together these reasons explain why 72.3% of the region is facing intensive soil erosion.⁴⁴ Thus, sedimentation problems do not give a long life to the dams within the GAP region other than *Ataturk*, *Keban* and *Karakaya*, that makes the whole project economically and practically inefficient for the government of Turkey bearing in mind the project has not been completed yet.

Another matter is that wastewater from the surrounding catchment flows directly into the *Ataturk* reservoir, which is used as a drinking water source. However, there is not enough data to evaluate the situation. Experience with reservoir projects indicates that present health education programs and the setting up of laboratories will not be sufficient to protect the affected people from waterborne diseases.⁴⁵ If the wastewater is not properly treated before being discharged into the reservoir, the quality of the water will deteriorate potentially causing ecological and health issues for both Syria and Iraq downstream.

It is worth mentioning that water quality in the Euphrates is affected by return flows from irrigation projects in Turkey and Syria, and is expected to worsen as more land is turned to irrigated. Within Iraq, much of the return flow is now drained into the Arab Gulf through the Main Outfall Drain, but considerable saline return flow enters the river system. On the Tigris River, the quality is further degraded with flood flows diverted into off-stream storage in the highly saline *Tharthar* Lake, and later returned to the river system carrying salts washed from the lake. Irrigation practices since historical times

⁴⁴ Ibid.

⁴⁵ Ibid.

have contributed to salinisation of farmland. Not only do increased salts accumulate in the soil profile but water quality directly impacts crop yields.

With regards to archaeological impacts, there are some settlements of historical importance in the region that will be submerged by the construction of dams. For example, the *Birecik* Dam would flood *Zeugma*, *Apamea*, *Urima* and *Halfeti* where the planners indicate that only two-fifths of *Halfeti* will be under water. It was also decided that water from this dam will be used as drinking water, not only for irrigation and energy. Because of this, the rest of the settlement must be abandoned because of the laws about the protection of drinking water sources. So, people from this area would have to relocate.⁴⁶ Except for the town citadel and its castle and palace, *Ilisu* Dam will submerge *Hasankeyf*, a first degree archaeological site. Other structures, which are unique to the region such as monumental bridges and many man-made caves carved into the rocks, will be lost under the *Ilisu* Dam Reservoir.⁴⁷

For social impacts in this region, the majority of inhabitants are of Kurdish origin, but are bilingual Kurdish and Turkish. The elder generation in this region mainly speaks Kurdish.⁴⁸ However, an interesting matter reveals when talking about the land distribution. In fact the land is not equally distributed among the population of the Southeast Anatolia. The most distinguishing feature of the GAP region is the large-scale landowners in a country characterised by small family farms. This is because land was given to tribal leaders for political support during the Ottoman Empire. These land

⁴⁶ Zeugma contains the historical relics from the Hattiti, Asur, Kommagene, Roman and Byzantine periods. Rescue excavations are discovering many significant archaeological findings but due to time limitations they cannot rescue all of them. Archaeologists demanding additional time were told that this would result in a 30 million dollar loss. Ibid.

⁴⁷ Ibid.

⁴⁸ A roadmap for a solution to the Kurdish question: Policy proposals From the region for the government. 2008. *Turkish Economic and Social Studies Foundation, Tesev Publications*, at p. 20. Available at http://www.tesev.org.tr/UD_OBJS/Report%20on%20Kurdish%20Question.pdf accessed 18 May 2009.

holdings have since been passed on down the family line.⁴⁹ So, abuse in human rights issues will be raised if the government of Turkey proceed with the GAP and attempt to relocate people while ignoring the consequences of such relocation.⁵⁰ Past experience showed that the resettlement plans were very poor. The worse scenario now is for the *Ilisu* dam, there are no detailed resettlement plans; this causes the local people to distrust the government.⁵¹ This plan, if implemented without a careful consideration,⁵² could jeopardise Turkey's status for acceding the European Union.

Finally, the impact of the GAP will be more serious on Iraq if the full development is achieved because the water flow of the Euphrates will decrease substantially.

⁴⁹ There are many villages in which one or relatively few families own all the cultivated land, with the land of some families extending beyond a single village boundary. Hence, it is estimated that approximately 32% of all large holdings in Turkey are located in this area where 231 families and 96 extended families own entire villages and where 30% of the households own no land. Small and medium sized landowners have struggled to compete with the neighboring large holdings which have access to mechanisation, more capital and the market. Ibid.

⁵⁰ Article 46, first paragraph, of the Constitution of Turkey reads: "The State and public corporations shall be entitled, where the public interest requires it, to expropriate privately owned real estate wholly or in part and impose administrative servitude on it, in accordance with the principles and procedures prescribed by law, provided that the actual compensation is paid in advance." The second paragraph reads: "The compensation for expropriation and the amount regarding its increase rendered by a final judgement shall be paid in cash and in advance. However, the procedure to be applied for compensation for expropriated land in order to carry out land reform, major energy and irrigation projects, and housing and resettlement schemes and afforestation, and to protect the coasts and to build tourist facilities shall be regulated by law. In the cases where the law may allow payment in instalments, the payment period shall not exceed five years, whence payments shall be made in equal instalments." *Constitution of the Republic of Turkey*, Oct. 17, 2001, reprinted at [http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE CONSTITUTION OF THE REPUBLIC OF TURKEY.pdf](http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf) [accessed 11 May 2010]. Furthermore, resettlement is regulated by two main laws – the Expropriation Law (No 2942) and the Resettlement Law (No 2510), which make provisions for state-assisted resettlement in both rural and urban areas. The involuntary resettlement of rural and urban populations was necessary for 9 large dams that 143, 530 hectares of land have been expropriated. A total of 88 sub-villages, 4 districts and a town are affected by the dam projects. Also, 87% of the families have opted for self-resettlement while only 13% have requested government-assisted resettlement. Sahan, *Supra*, footnote 34, at p. 4.

⁵¹ Ibid.

⁵² The nature of the considerations should include: consultation and participation with local stakeholders, consideration of the problem of land title, deeds, forced land confiscation and absentee rural families, and consideration of the needs of the poor, the landless, small holding farm households and vulnerable groups, including women and children. Finally, monitoring of resettlement should be implemented with a participatory approach, inclusive of all local stakeholders, vulnerable groups and the poor. However, this requires considerable political will in an institutional culture and political system not used to open consultative processes. Ibid., at pp. 5-7 & 12.

Besides the GAP, Turkey has the capability of supplying water to all the regions it may need for irrigation provided that financial and technical difficulties are no longer obstacles. The reason is that Turkey can be regarded as self-sufficient in water due to the many rivers inside its territory, although some writers from Turkey claim the opposite. The ‘Peace Water Pipeline’ proposed by President Turgut Özal in 1986 is the evidence supporting the researcher’s claim. Gruen said:

“The concept of exporting Turkish water to promote regional peace and economic development in the Middle East has been a constant in Turkish foreign policy since the late President Turgut Özal in 1986 proposed an extensive "Peace Water Pipeline" This was a \$21 billion project to bring vast quantities of water from the Seyhan and Ceyhan Rivers via two pipelines to supply the major cities in Syria, Jordan, and the Arab Gulf states. The pipelines could convey 10 million cubic meters of water every day, which was estimated as sufficient to meet the needs of 15 million persons.”⁵³

Although the Turkish proposal was rejected by the Arab States due to the Arab-Israel conflicts, it can be said that such a massive project could in fact promote great and exemplary regional stability. Such a proposal shows that the availability of water in Turkey may be greater than its national demand for water.

2.6 The reality of the new Iraq

Under this section, Iraq’s national struggles for water as a result of Gulf Wars I and II, economic sanctions and the current occupation by the allied forces will be discussed. The justification is to identify how GAP could worsen the situation in Iraq.

⁵³ Gruen, George E. Turkish water exports: a model for regional Cooperation in the development of water Resources. *Columbia University Middle East Institute*. New York, at pp. 2-8. Available at <http://www.ipcri.org/watconf/papers/george.pdf>, accessed 25 March 2010.

2.6.1 Iraq's internal water problems

Two devastating wars, a decade of debilitating sanctions, and a recent lawless spate of looting have left the Iraqi water infrastructure struggling and, for the most part, failing to provide Iraqis with potable water. According to Dahr, the UN reported that prior to the 1991 Gulf War (GW I), Baghdad received about 450 litres per person supplied by seven treatment plants withdrawing water from the Tigris River. The rest of the country had about 200 to 250 litres per person per day, purified and supplied by 238 water-treatment plants and 1,134 smaller water projects. However, with the bombing from the U.S.-led coalition during the GW I widespread destruction of power plants, oil refineries, water treatment facilities and manufacturing plants for water treatment chemicals occurred. In addition, all facilities which depended on electricity for operation went out of service. As a result, the supply of water per person in Baghdad dropped to less than 10 litres per day.⁵⁴

When the GW I ended, recovery efforts improved supplies but only to a level less than ten percent of the previous overall supply. Fuel for backup generators was in short supply, as were parts and manpower necessary to run backup devices. Bomb-damaged water treatment facilities and the associated power facilities were unable to operate, thereby allowing the release of untreated sewage directly into the Tigris River, which is the primary source of water for Baghdad and most of the rest of Iraq's water treatment plants.

During the following decade, the effect of the GW I and the strict sanctions on the water supply in Iraq led to a humanitarian crisis of immense proportions. The sanctions

⁵⁴ Jamail, Dahr., 2004. Bechtel's Dry Run Iraqis suffer water crisis, A special report by Public Citizen's Water for All Campaign. *Water Activist*, at pp. 9-12. Available at www.wateractivist.org, accessed 23 June 2008.

prevented Iraq from importing much specialty equipment on which it depends for processing the brackish water found in the region. Chemicals used to treat water, such as chlorine, were also barred from entering the country.⁵⁵

According to UN Children's Fund (hereinafter the UNICEF), the crippling sanctions' effect on water services resulted in the deaths of some hundreds of thousands of Iraqi children. In a 1991 United States Defence Department document, declassified in 1995, the Pentagon revealed that it had predicted the crisis and acted to limit Iraqi potable water capability anyway. The document says, "Failing to secure supplies will result in a shortage of pure drinking water for much of the population. This could lead to increased incidences, if not epidemics, of disease."⁵⁶

Furthermore, the lack of clean drinking water in Iraq is fundamentally changing the way typical Iraqis lead their everyday lives. Households find themselves suffering from health problems associated with bad water quality, and their lives increasingly defined by the pressures exerted by the scarcity of water. Most of the foreign companies who were contracted to provide water services to the Iraqis have failed to operate for various reasons. For example repairs are often constrained by lack of security while many of the water and sewage treatment plants are dependent on electricity for their normal operations.⁵⁷ Besides that the Tigris River has long been described by local environmentalists as a graveyard of bodies. In addition, the water level is decreasing as pollution increases. The pollution in the River is caused by oil derivatives and industrial waste as well as Iraqi and US military waste. Previously Tigris River was considered as

⁵⁵ Ibid.

⁵⁶ Iraq surveys show 'humanitarian emergency'. 1999. *Information News Line*, UNICEF Website. Available at <http://www.unicef.org/newsline/99pr29.htm>, accessed 12 May 2010.

⁵⁷ Dahr, *Supra*, footnote 54. also Iraq: No let-up in the Humanitarian Crisis. 2008. *International Committee of the Red Cross*, at pp.3-5. Available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/iraq-report-170308/\\$file/ICRC-Iraq-report-0308-eng.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/iraq-report-170308/$file/ICRC-Iraq-report-0308-eng.pdf), accessed 13 May 2010.

one of the main sources of water, food, transport and recreation for the local population but after four years of war and pollution, it is now considered as a stagnant sewer.⁵⁸

The report mentions further that some back-up generators exist but many of these systems are plagued by the lack of spare parts and normal maintenance, vandalism, and lack of fuel. In addition, there is a general lack of trained manpower to operate the treatment plants on a regular basis while solid waste collection and disposal is hampered by a lack of a trucking fleet and excavators. The report's assertion that there was no wastewater treatment and very little water treatment prior to GW I is an extreme exaggeration.

Finally, the situation in the middle and northern parts of Iraq is no less worrying. In the capital, for instance, the Tigris River is at its lowest level since 2001, with broad areas of reeds exposed on each bank. To the north of Baghdad the flow in some irrigation canals, particularly in *Diyala* province, is considered to be so low that it is too salty and unfit for human consumption, or even for use on plants and by animals. Further north, there are many dry canals and barren fields to be seen. In Kurdistan, some villagers have left their homes and headed to cities because the village wells have dried up. Disease has become widespread in the north of Iraq as well; cholera has broken out, the disease is typically spread by contaminated water, a higher risk when rivers are stagnant and wells low.⁵⁹ Thus, Iraq can be considered as in the grip of a severe drought and desperately needs more water for drinking and agriculture. Such a dire situation calls for immediate tripartite negotiations and a sole treaty on the management of the TERB with

⁵⁸ The river is gradually being destroyed and there are no projects to prevent its destruction. Iraq: River Tigris Becoming A Graveyard Of Bodies. 2008. *IRIN Report, Humanitarian News and Analysis, A Project of the UN Office for the Coordination of Humanitarian Affairs*. Available at <http://www.irinnews.org/Report.aspx?ReportId=72023>, accessed 13 May 2009.

⁵⁹ Iraq in water talks with Turkey, Syria as rivers run dry. 200. *The Raw Story website*. Available at http://rawstory.com/news/afp/Iraq_in_water_talks_with_Turkey_Syr_05272008.html, accessed 23 July 2008.

Turkey and Syria notwithstanding that neither Turkey nor Syria can be fully blamed for this situation. It was the war and internal conflicts created this mess. However, such a bad status can be mitigated if the riparian States are willing to increase the quantity and to some degree the better quality of the waters entering Iraq.

2.6.2 Status of the Marshlands in Iraq

The marshlands in southern Iraq are considered as the largest wetland ecosystem in the Middle East and Western Eurasia. In addition to that, they are seen as crucial part of intercontinental flyways for migratory birds; they support endangered species, and sustain freshwater fisheries, as well as those of the Persian Gulf. Also they are unique from the global perspective of human heritage as they have been home to indigenous communities for millennia and are regarded as the site of the legendary ‘Garden of Eden’.⁶⁰

These marshlands have been seriously damaged during the last two decades by dewatering of the area to foster agricultural production as well as to divert waters away from the marshes for political reasons. This has had an adverse impact on the ecosystem and the indigenous populations. Furthermore, the total area of 17 000 km² has shrunk to about 3 000 km² by middle of 2009 attributable to the construction of a number of dams upstream whether inside Iraq, Syria or in Turkey.⁶¹ According to the UNEP, the serial satellite images confirm a loss of around 90 percent of the area of lake and marshlands. Accordingly, this rapid decline represents one of the most significant

⁶⁰ Environment in Iraq. 2003. *UNEP Progress Report, Geneva*, at pp. 22-23. Available at http://www.unep.org/dewa/westasia/Assessments/national_SOEs/west%20asia/Iraq/Progress%20Study%20of%20Iraq.pdf, accessed 20 December 2009.

⁶¹ Frenken, Karen., 2009, Irrigation in the Middle East region in figures, AQUASTAT Survey–2008. *FAO Land and Water Division, Rome*, at pp. 212-213. Available at <ftp://ftp.fao.org/docrep/fao/012/i0936e/i0936e08.pdf>, accessed 22 December 2009.

environmental events to have occurred globally during the past three decades.⁶² Although attempts at restoration were made after the 2003 invasion, the potential success of these restoration efforts depends primarily on the availability of sufficient quantities and satisfactory quality of water to the marshland. The loss of such an important habitat illustrates the pressures on wetlands in the region, which are likely to intensify in future as demand for water continues to increase.

2.7 Conclusion

The Tigris and Euphrates are the main focus of development by the three riparian States. From what has been shown in this Chapter, it can be concluded that all the riparian States have affected the development of the TERB particularly in terms of utilising and polluting the TERB. It is submitted that with the commencement of large-scale projects in the TERB has become a source of discord between the riparian States. For example, the rapid implementation of the Turkey's GAP has caused a further deterioration in the relationship between the riparian States.

Although no major projects on the Euphrates inside Syria were mentioned in this Chapter, it can be assumed that the natural flow of the Tigris and Euphrates Rivers do change as they pass from Turkey through Syria to Iraq, due to irrigation and energy projects that the riparian States have already initiated. Another input to this problem is that rapidly increasing populations of these countries and the importance given to agricultural development and food production necessitate further utilisation of the TERB.

⁶² Global Environment Outlook 3, Past, present and future perspectives. 2002. *Earthscan Publications Ltd UNEP*, at pp. 143-144. Available at http://www.unep.org/dewa/westasia/assessments/national_SOEs/Other%20SOE%20Reports/GEO3/GEO-3_Biodiv.pdf, accessed 22 December 2009.

Although there is no consensus on the relative irrigable land area between the riparian States, from the available data it can be concluded that Iraq has a larger irrigable area than Syria. Moreover, the amount of the irrigable land in Iraq is relatively close to that of Turkey. Perhaps, if the situation in Iraq stabilises and actual development carried out, the irrigable land in Iraq could be greater than that of Turkey. This gives an advantage to Iraq when negotiating their share of the TERB resources with Turkey and Syria based on the equitable utilisation principle.

It was argued that lack of co-ordination among the riparian States, and competition over the Euphrates River in particular, has increased the need for integrated planning of the TERB. Furthermore, the main objective of building the dams were for multipurpose water projects such as irrigation, flood control, water storage and hydro-electricity.

In terms of environmental impacts, it was concluded that the GAP has caused erosion, salinisation, sedimentation and pollution potentially affecting the riparian States especially Iraq as the downstream co-riparian State. Besides that, it has or will lead to mass displacement in the GAP region that has adverse effects for the local communities in the area and has impacted on important archaeological sites..

Inside Iraq, due to 23 years of wars, economic sanctions, the US-led invasion and lack of security, the water infrastructure has been left in a dismal state, despite some improvement efforts since 2003. Also the water quality of both rivers has deteriorated mainly as a result of pollution created by all the actors. Next, the government's interventionist agricultural policies since the 1980s, have meant that, economically, agricultural outputs have not been commensurate with investments. Last but not least, the southern marshlands in Iraq are in their worst state for three decades and will face

further adverse consequences as a result of water shortages when the GAP implementation is complete.

Finally, many observers consider the Euphrates as a regional water resource capable of overcoming water shortages in the region. However, most of the studies to date have focussed on the State policies pertaining political and social issues that directly or indirectly influence the inter-State relationships at the TERB level. There has been far less observation and application of international law towards solving this significant issue for the people of the region, although some prominent writers like McCaffery and Wolf have referred to the position of international law on the issue. What is important here is to examine how international law can solve this problem between the riparian States rather simply the setting out of legal positions. In other words, guidance is needed from international law on how to implement better water management in the region. Such guidance should be capable of attracting all the riparian States towards real cooperation.

Hence, in light of the recent developments given in this Chapter, it is imperative to theoretically examine all the factors that contribute to strengthening international law and future cooperation between the riparian States in the management of the TERB. These factors include the importance of the TERB to the riparian States, power asymmetry issues vis-a-vis States' rights and obligations under international law, the legal positions of the riparian States under the current international water law, and how to introduce a legal framework for managing the TERB. Each of the above issues will be examined separately in different chapters.

Next Step

The following Chapter Three will analyse whether Turkey as the upstream State of the TERB can be considered as a State exercising hegemony; does it impose its policy in the region since there is a situation of power asymmetry between the riparian States? How does international law respond to this situation? These issues will be examined through considering transboundary water issues in the TERB region under current international water law.

CHAPTER THREE

‘TERB’: TRANSBOUNDARY WATER QUANDARY BETWEEN THE THREE RIPARIAN STATES

3.1 Introduction

Writers from many different disciplines have covered various themes in respect of the TERB. For example Zeitoun¹ and Haftendorn² have covered the political aspects of the TERB through examining the theories of hegemony and hydro-hegemony. The surrounding economic and scientific topics close to this subject are written by Professors Allan³ and Wolf.⁴ On the other hand, McCaffrey,⁵ a prominent international water law writer, has written significant articles and books on the application of international water law, and applied it partly to the TERB and other transboundary rivers in the world. He has discussed political issues at the TERB level without significant deviation from the main subject of international water law. Finally, Wouters and Vinogradov⁶ have proposed the third approach, which is in fact unique from the

¹ Zeitoun, Mark & Warner, Jeroen., 2003. Transboundary water conflicts in the Middle East and North Africa. *Water Communicating International Development Research, ID 21 Natural resources Highlights*. Available at <http://www.iwmi.cgiar.org/>, accessed 17 May 2010. also Vagts, Detlev F., 2001. Hegemonic International Law. *The American Journal of International Law*, 95(4), at p. pp. 843-848. also Christopher, Chase-Dunn., 1994. Hegemony and Social Change. *Mershon International Studies Review*, 38(2), at pp. 361-376. also Lake, David A., 1993. Leadership, Hegemony, and the International Economy: Naked Emperor or Tattered Monarch with Potential? *International Studies Quarterly*, 37(4), at p. 459-489. Also Loewenstein, Karl., 1954. Sovereignty and International Co-operation. *The American Journal of International Law*, 48(2), at pp. 222-244. also Lipsitz, George., 1988. The Struggle for Hegemony. *The Journal of American History*, 75(1), at pp. 146-150. also Mares, David R., 1988. Middle Powers under Regional Hegemony: To Challenge or Acquiesce in Hegemonic Enforcement. *International Studies Quarterly*, 32 (4), at pp. 453-471.

² Haftendorn, Helga., 2000. Water and ‘International Conflict’. *Third Water Quarterly*, 21(1), at pp. 52-55.

³ Allan, Antony J., 2002. Hydro-Peace in the Middle East: Why no Water Wars? A Case Study of the Jordan River Basin. *SAIS Review*, 22(2). Available at http://muse.jhu.edu/journals/sais_review/toc/sais22.2.html, accessed 10 May 2010.

⁴ Wolf, Aaron T., 1996. Middle East Water Conflicts and Directions for Conflict Resolution. *Food, Agriculture, and the Environment Discussion Paper 12, International Food Policy Research Institute*, Washington, D.C. Available at <http://www.ifpri.org/2020/dp/dp12.pdf>, accessed 10 August 2008.

⁵ McCaffrey, Steven C., 2001. *The Law Of International Watercourses: Non-Navigational Uses*. Oxford University Press, at p.17.

⁶ Wouters, Patricia., et al. 2005. Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model. *International Hydrological Programme, IHP VI, Technical Documents in Hydrology*, (74). also Wouters, D. P., 1999. The Legal Response to International Water Scarcity and Water Conflicts: The UN Watercourses Convention and Beyond. *Natural Resources Forum, Dundee, The African Water Page*. Available at http://www.africanwater.org/pat_wouters1.htm#_ftnref2,

others. Their approach is to focus on the role of water law both nationally and internationally in the development of an integrated water resources management strategy. According to Wouters and Vinogradov, only when States successfully recognise and observe their rights and obligations under international law, will the other issues be resolved. The current thesis continues in this direction without disregarding other writers' approaches. Hence, the purpose of this literature review is to consolidate the hypothesis and rationale of the thesis, which addresses the main research question to demonstrate that international law is the principal instrument to support Iraq to achieve its legal entitlements to equitable and reasonable use of its transboundary waters.

Pursuant to the abovementioned hypothesis, the overall framework of the chapter elaborates on the issues mentioned in the above paragraph, before discussing the application of international law in the TERB. Thus, this chapter presents a theoretical foundation using theories of international relations, and the understanding of both the 'Rambo theory'⁷ and the 'balance of power'⁸ theories. Subsequently it will highlight the role of international water law in minimising such political factors that may strengthen the roots of international conflicts on water resources management. For example, Macquarrie has described the Treaty of Friendship and Good Neighbourliness signed

accessed 24 February 2008. also Wouters, P., Salman, M. A. & Jones, Patricia., 2000. The Legal Response to the World's Water Crisis: What legacy from The Hague? What future in Kyoto? *World Water Forum, The African Water Page*. Available at <http://www.africanwater.org/documents.htm>, accessed February 2008.

⁷ Rambo theory comes to application whereby there is a state or states that control a river's source or upper flow placing the lower lying riparian states at a disadvantage. As such a state or states would profit from this situation it would be in their interest to maintain the status quo and not to attempt to reach an understanding with the lower-lying riparian State. Haftendorn, *Supra*, footnote 2, at p.52.

⁸ The theory of Balance of Power has certain key aspects that have been agreed upon throughout the literature on the subject. It starts from the main objective of States. According to the Balance of Power theory is to secure States' own safety, consistent with political realism or the realist world-view. Then states reach equilibrium because of the objective of self-preservation. States, by trying to avoid the dominance of one particular state, will ally themselves with other states until equilibrium is reached. Partha, Chatterjee., 1972. The Classical Balance of Power Theory. *Journal of Peace Research*, 9(1), at pp. 51-55.

between Iraq and Turkey in 1946⁹ relating the cooperation over the shared water as “a chaotic regime of claim and counterclaim governed more by political than legal concerns.”¹⁰ This statement demonstrates the necessity of examining the concepts of conflict and cooperation through consideration of international politics vis-à-vis international law. Whilst considering the relevant literature, some drawbacks in the legal regime of the TERB will be identified. Cognisance of the drawbacks in the current legal regime of the TERB will allow the riparian States to move towards potential cooperation.¹¹ The contribution offered by this Chapter is to identify how lack of reciprocity could contribute to growing conflicts and how it restricts the chances for real cooperation.

3.2 Water Conflicts in the Middle East

Regardless of any regional context, one of the problems with the management of water is its transitory character. Whether temporary or permanent, rivers, lakes and aquifers are very unevenly distributed across one hundred and forty-five political boundaries without passports or documentation.¹² Wolf describes water as “not only ignoring our political boundaries, it evades institutional classification and eludes legal

⁹ *Treaty of Friendship and Neighbourly Relations between Iraq and Turkey*, Mar. 29, 1946 (entered into force May 10, 1948), U.N.T.S. (1949), reprinted at http://untreaty.un.org/unts/1_60000/1/39/00001912.pdf [accessed 27 May 2010]

¹⁰ Patrick, Macquarrie., 2004. *Water Security In The Middle East Growing conflict over development in the Euphrates Tigris Basin*. Thesis, M.Phil International Peace Studies, Trinity College, Dublin, Ireland, at p. 34. Available at http://waterwiki.net/index.php/Water_Security_in_the_Middle_East:_Growing_Conflict_over_Development_in_the_Euphrates-Tigris_Basin, accessed 10 March 2009.

¹¹ Ibid.

¹² Rivers have figures in common, such as; they cross one or more State boundaries or even as boundary itself. Beyond scarcity: Power, poverty and the global water crisis. 2006. *Human Development Report*, United Nations Development Programme, at pp. 203-205. Available at <http://hdr.undp.org/en/media/HDR06-complete.pdf>, accessed 26 May 2010.

generalisations".¹³ Frequent and regular rainfall in some regions provides an abundance of fresh water, contrasting sharply with prolonged drought in other regions where growing conflicts over increasingly scarce freshwater resources emerge.¹⁴ Bearing in mind that most countries have institutional rules and regulations for allocating water and resolving disputes within their boundaries, cross-border enforcement and other mechanisms are much weaker, and the mix of water scarcity and flimsy institutions can carry a real risk of conflict.¹⁵ As such, the international character of water has brought complexities to riparian States on different levels and whilst effective cooperation on fresh water management still remains important,¹⁶ fact finding remains indispensable.¹⁷

In the Middle East, water does not escape from the reality of the abovementioned character and scarcity. The Middle East is a strategic region in the world in connection to religion and energy resources, though water has become a major factor in recent years.¹⁸ A World Bank reports revealed that there is widely recognition that the Middle East and North Africa region is by far the driest and most water scarce region in the

¹³ Wolf, Aaron T., 1998. Conflict and Cooperation along International Waterways. *Water Policy* 1, at p. 251. Available at http://www.transboundarywaters.orst.edu/publications/conflict_coop/, accessed 11 November 2007.

¹⁴ Vinogradov, S., Wouters, P.K., Jones, P., 2003. Transforming Potential Conflict in to Cooperation Potential: the Role of International Water Law. *PCCP Publications*, 2, at p. 2. Available at <http://www.unesdoc.unesco.org/images/0013/001332/133258e.pdf>, accessed 16 November 2008.

¹⁵ Cooperation over water is more pervasive than conflict and more essential than ever. Beyond scarcity, *Supra*, footnote 12, at pp. 227-228. From the 145 treaties which govern the world's international watersheds, four-fifths have no enforcement mechanism. Hamner, Jesse H., & Wolf, Aaron T., 1998. Patterns In International Water Resource Treaties: The Transboundary Freshwater Dispute Database. *Colorado Journal of International Environmental Law and Policy*, 1997 Yearbook. Available at <http://www.transboundarywaters.orst.edu/publications/patterns/>, accessed February 2008.

¹⁶ Mostert, Eric., 2003. Conflict and Cooperation in the Management of International Freshwater Resources: A Global Review. *PCCP Publications*, 19, at pp. 3-4. Available at <http://webworld.unesco.org>, accessed 28 February 2008.

¹⁷ Beyond scarcity, *Supra*, footnote 12, at p. 229.

¹⁸ Selby, Jan., 2005. The Geopolitics of Water in the Middle East: Fantasies And Realities. *Third World Quarterly*, 26(2), at pp. 330-331. It is also stated that water has become a commodity as important as oil. Ofori-Amoah, Abigail., 2004. Water Wars and International Conflict. *University of Wisconsin-Eau Claire, USA*. Available at <http://academic.evergreen.edu/g/grossmaz/OFORIAA/> accessed 2 February 2008. also NiMr.od, Raphaeli., 2002. Regional Economic News. *The Middle East Media Research Institute*, 28. Available at <http://meMr.i.org/bin/articles.cgi?Page=subjects&Area=economic&ID=EA2802>, accessed 2 February 2008.

world which will increasingly affect the economic and social development of most countries of the region. One of the reasons is the population percentage which is five percent of the world population in parallel with less than one percent of the available world's freshwater resources.”¹⁹ See table 1 below.

A	B	C	D	E
Sub-Saharan Africa	3.8	7.1	8.0	16.0
East Asia and the Pacific	9.3	5.3	less than 1.0	6.0
South Asia	4.9	4.2	0.0	0.0
Eastern Europe and former USSR	4.7	11.4	3.0	19.0
Other Europe	2.0	4.6	6.0	15.0
Middle East and North Africa	0.3	1.0	53.0	18.0
Latin America and the Caribbean	10.6	23.9	less than 1.0	4.0
Canada and the United States	5.4	19.4	0.0	0.0
World	40.9	7.7	4.0	8.0
Legend for Chart: A. Region B. Annual internal renewable water resources Total (thousands of cubic meters) C. Annual internal renewable water resources Per capita (thousands of cubic meters) D. Percentage of population living in countries with scarce annual per capita resources Less than 1000 cubic meters E. Percentage of population living in countries with scarce annual per capita resources Between 1000 and 2000 cubic meters				

Source: World Bank, 1992.²⁰

¹⁹ Sector Overview and Development Context: Water Scarcity Is a Serious Development Challenge Facing the Region. *World Bank Report*, para. 1. Available at www.worldbank.org, accessed 22 February 2008.

²⁰ World Development Report 1992: Development and the Environment. Oxford University Press New York for World Bank. in Tomanbay, Mehmet., 2000. Turkey's Approach To Utilization Of The Euphrates And Tigris Rivers. *Arab Studies Quarterly*, at p.12. Available at http://findarticles.com/p/articles/mi_m2501/is_2_22/ai_65653665/pg_1?tag=artBody:coll, accessed 17 June 2008.

Table 1: Availability of Water, by Region in the World.

Fox suggested that the relevant parties to the dispute, Turkey, Syria, and Iraq on one hand, and Israel (including the Occupied Territories), Jordan and Syria on the other, all view water as a fundamental strategic asset, a bargaining tool and a potent political weapon with the potentially significant influence on the regional balance of power.²¹ Thus, in order to achieve cooperation between the riparian States, the definition of ‘conflict’ should be well established so that the precise meaning is understood and unequivocal responses for cooperation can be garnered.²² However, prior to entering the main discussions and explanations regarding conflict and cooperation, it is important to bear in mind three relevant and interrelated scenarios that are the most frequent causes of transboundary conflicts not only in the Middle East, but globally. These scenarios are: water security for agriculture and industrial use, hydro-geographical diversities, and energy security, as will be discussed below.

3.2.1 Water security

The term ‘water security’ aims to capture the complex concept of holistic water management and the balance between resource protection and resource use. Achieving water security is a key component in meeting agreed international development targets related to reducing poverty alleviation, improving health and maintaining environmental resources. Although they are not binding in nature, it is worth mentioning the ministerial declarations in both World Water Forums 3 and 5 (WWF3 & WWF5) about water security. The Ministerial Declaration in WWF3 has mainly emphasised meeting

²¹ Fox, Jason D., 1993. The Politics of water scarcity in the Euphrates and Jordan River Basins. *Simon Fraser University, Burnaby BC*, atp.9. Available at http://www.ppl.nl/passcat.php?sig=WATER_b15282995.pdf, accessed 14 May 2009.

²² States have different means to protect their national interests and international legal rights. The word ‘conflicts’ carries wide and general meaning that can be on anything. In which conflicts on water can cover a small part of that meaning, as it will be discussed in the following sections in this chapter.

basic needs, securing the food supply, protecting ecosystems, sharing water resources, managing risks, valuing water and governing water wisely.²³ In the Ministerial Process Statement at WWF5 in Istanbul, the need to achieve water security was reiterated and that, to this end it was emphasised that, it is vital to increase adaptation of water management to all global changes and to improve cooperation at all levels.²⁴

Considering water security in the regional context, the subject of water security was brought into sharper focus after the impact of Gulf War I and subsequent UN Economic sanctions against Iraq. Such impact made many States in the Middle East follow a national security approach to secure more water based on the notion of food security. Recognition of their vulnerability to economic sanctions and the importance of food security²⁵ and industrial development²⁶ heightened the importance of water security in

²³ The third element of the declaration provides for achieving water security that they declared to face the following main challenges:

1. Meeting basic needs: to recognise that access to safe and sufficient water and sanitation are basic human needs and are essential to health and well-being, and to empower people, especially women, through a participatory process of water management.
2. Securing the food supply: to enhance food security, particularly of the poor and vulnerable, through the more efficient mobilisation and use, and the more equitable allocation of water for food production.
3. Protecting ecosystems: to ensure the integrity of ecosystems through sustainable water resources management.
4. Sharing water resources: to promote peaceful co-operation and develop synergies between different uses of water at all levels, whenever possible, within and, in the case of boundary and trans-boundary water resources, between states concerned, through sustainable river basin management or other appropriate approaches.
5. Managing risks: to provide security from floods, droughts, pollution and other water-related hazards.
6. Valuing water: to manage water in a way that reflects its economic, social, environmental and cultural values for all its uses, and to move towards pricing water services to reflect the cost of their provision. This approach should take account of the need for equity and the basic needs of the poor and the vulnerable.

7. Governing water wisely: to ensure good governance, so that the involvement of the public and the interests of all stakeholders are included in the management of water resources. *Ministerial Declaration of The Hague on Water Security in the 21st Century*, The Hague, The Netherlands, Mar. 22, 2000, reprinted at <http://www.waternunc.com/gb/secwwf12.htm> [accessed 27 May 2010]

²⁴ *Ministerial Process Istanbul Statement*, Istanbul, Turkey, Mar. 22, 2009, reprinted at http://www.freshwateraction.net/web/d/doc_443.pdf [accessed 18 April 2009].

²⁵ Serageldin, Ismail., 2000. Towards Water Security: A Framework for Action. *Global Water Partnership*, Sweden, at pp. 11-12. Available at http://www.gwpsudamerica.org/docs/publicacoes/doc_78_en.pdf, accessed March 2008. also Snowden, Lori., 2001, *The Hydropolitics of the Tigris and Euphrates: International Law. Resource Diplomacy and Turkish State Formation*, at pp. 195-196. Available at <http://www.research.deakin.edu.au/performance/pubs/reports/cd/2005/output/comp/comp2001.htm>, accessed 12 July 2008.

many States in the region. The challenges facing states in the Middle East include the need for irrigated agriculture, which requires tremendous amounts of water,²⁷ water pollution²⁸ and satisfying the demands of domestic and industrial use particularly in the dry climate of the Middle East.²⁹ To avoid repeating the Iraqi scenario of food insecurity, the upstream States tend to manage their territorial water and to utilise as much water as possible. In such circumstances, the upstream-downstream negotiations towards an equitable utilisation of their joint use of water may carry more difficulties to the proper 'settlement' than prior to Gulf War I in 1991.

The problems start from the point where all the riparian States of the TERB shifted from being net exporters of grain to net importers, yet Syria and Iraq have even less ability to produce sufficient quantities of food staples. Despite its comparative food security, Turkey's goal for GAP is to turn its south-eastern region into a breadbasket. For both of the lower riparian States, Turkey's water-intensive development threatens their irrigated agricultural potential. Self-sufficiency in the agricultural sector has long been aspired to in Syria and continues to be so, particularly with respect to staples such as wheat, cotton, and olives. In Iraq, past policy has emphasised the reduction of foreign dependency on foodstuffs. Although emphasis on self-sufficiency has lessened due to

²⁶ It was estimated that world water withdrawals for industry is 22% of total water use. The high-income countries: 59% of total water use, whereas the low-income countries: 8% of total water use. The annual water volume used by industry will rise from 752 km³/year in 1995 to an estimated 1,170 km³/year in 2025, in which the industrial component is expected to represent about 24% of total freshwater withdrawal. Ibid.

²⁷ International experts have figured out that almost 70% of all available freshwater is used for agriculture. It takes an enormous amount of water to produce crops. For example, one to three cubic metres to yield just one kilo of rice, and 1,000 tons of water to produce just one ton of grain. Facts and Figures: The Different Water Users 2003. *International Year of Fresh Water*, para. 3. Available at <http://www.wateryear2003.org/en>, accessed 10 February 2009.

²⁸ The experts have also found that the high-income countries contribute 40% to the food sector to the production of organic water pollutant, whereas the low-income countries contribute about 54%. More than 80% of the world's hazardous waste is produced in the United States and other industrial countries. In developing countries, 70% of all industrial waste is dumped untreated into waters where it pollutes the usable water supply. Ibid.

²⁹ Anderson, Ewan W. & Fisher, William B., 2000. *The Middle East: geography and geopolitics*, (8th Edition), Routledge, at pp. 30-33.

present conflicts within the country, it has been stated as the long term goal for the sector as reconstruction efforts begin.³⁰

3.2.2 *Hydro-Geographical diversities*

In theory, the most logical approach to effective transboundary water management would be for co-riparian states to trading agricultural resources, hydropower and other services according to their comparative advantage in water use. To take an obvious example, hydropower is more cost-effective in mountainous regions where rivers drop in elevation over short distances while irrigation is more efficient in valleys and plains. Trading hydropower for agricultural goods is one way of tapping into this comparative advantage. Yet in practice, most river basins lack the institutions to resolve differences and coordinate shared resources, and factors such as trust and strategic concerns weigh heavily in government policy.³¹

3.2.3 *Energy security*

Hydroelectric power has influenced the strategic plans for fulfilling the energy demands in both Syria and Turkey. In Iraq, the abundance of alternative energy resources make the upstream control of flows less essential to internal energy supply. Turkey's reluctance to rely heavily on external sources of energy is largely financially motivated. Turkey wishes to reduce its dependency on expensive imports by producing at least 40 percent of its required energy from domestic hydroelectric production. The GAP hydroelectric development was projected to save the country about 28 million tons of oil imports annually. In 2001, Syria and Iraq were net exporters of crude oil as opposed

³⁰ Akanda, Freeman A & Placht, M., 2007. The Tigris-Euphrates River Basin: Mediating a Path Towards Regional Water Stability. *Annakhla, The Fletcher School Journal for issues related to Southwest Asia and Islamic Civilization*, at p.3. Available at http://fletcher.tufts.edu/al_nakhlah/archives/spring2007/placht-2.pdf, accessed 31 May 2008.

³¹ Beyond scarcity, *Supra*, footnote 12, at p. 206.

to Turkey, which, significantly, had to import approximately 63 percent of its fuel. Yet, growing cooperation has been observed in recent years between Iraq and Turkey on energy supply, transportation and production.³² Despite the fuel reserves that Syria possesses, hydropower is their predominant source of electrical energy. This places Syria in a vulnerable position because Turkey has the potential to exert control over Syria's primary electricity source, further exacerbating an already contentious issue.³³

The above previous two scenarios place the upstream States in an advantageous position. That is how geological asymmetry is observed in the Tigris and Euphrates River Basin. For example, both the Tigris and Euphrates Rivers spring out from the mountainous area in South East Anatolia, where it supports constructing hydropower dams in the region despite some scientific defects, as been mentioned in Chapter Three. In both Syria and Iraq, the land is flatter and suitable for agriculture and the rise of temperature in the summer would make life nearly impossible without sufficient water flows from the TERB. If Turkey utilises all the water it plans to for its irrigable lands in the TERB, life in both Iraq and Syria will become much more difficult.

As Turkey has the hydro-geographical advantage and can control the flow in the Tigris and Euphrates, the situation warrants the return of financial or political benefits to the disadvantaged downstream states through an agreement.³⁴ Iraq is a weak State compared to Turkey in terms of both military might and economy due to 23 years of Gulf Wars 1 and 2, and the consequent economic sanctions, it will be harder for Iraq to force Turkey to comply with its international obligations towards Iraq and Syria without

³² According to Turkish Energy Minister Hilmi Guler, Turkey and Iraq will build thermal power stations. Their number will be decided after bilateral talks but I can say one will be in Iraq and one will be in Turkey. Iraqi PM Discusses Energy, Security in Turkey, Turkey agreed to expand energy cooperation with neighbouring Iraq., 2007. *Javno Online Newspaper*. Available at http://www.javno.com/en-world/iraqi-pm-discusses-energy-security-in-turkey_68935, accessed 6 December 2008.

³³ Akanda, Freeman & Placht, *Supra*, footnote 30, at p. 3.

³⁴ Snowden, *Supra*, footnote 25, at p. 61.

crucial beneficial return. This is the Rambo situation, which will be discussed later. To illustrate the existence of the scenario, the concepts of conflict and cooperation will be discussed in the light of international politics and law in the following section.

3.3 Definitions and Theories of Conflicts

It is not the main purpose of this section to expand upon the differences between the definition of ‘conflict’ and that of ‘cooperation’, but rather to examine why conflicts arise between two States over their common interests?

The term ‘conflict’ is defined as an act to come into collision or disagreement, or to be contradictory, at variance, or in opposition and clash.³⁵ It is an all-embracing notion covering the entire spectrum of possible situations where the interests of States may collide from minor differences in opinion to the other extremity of situations of tension and hostility that may threaten international peace and security.³⁶

With regards to term ‘conflicts’ in international water law it often involves interactions between various actors particularly water users and stakeholders in the water resources management process,³⁷ which further involves numerous uncertainties associated with

³⁵ Garner, Bryan A., 2004. *Black's Law Dictionary*, (8th Ed). St. Paul, Minn. See the word ‘Conflict’.

³⁶ Vinogradov, Wouters & Jones, *Supra*, footnote 14, at p. 25. However, the term conflict should not be confused with dispute. Black's Law dictionary defines the term dispute as a conflict or controversy, and a conflict of claims or rights. Garner, *Supra*, footnote 35. Many international disputes arise from disagreements on questions of fact. Inquiry and fact-finding are procedures specifically designed to produce an impartial finding of disputed facts. However, the term conflict should not be confused with dispute. Black Law dictionary defines the term dispute as a conflict or controversy, and a conflict of claims or rights. *also* the PCIJ's decision in the Mavrommatis Palestine Concessions case defined the term dispute as a disagreement on a point of law or fact, a conflict of legal views or of interest between two persons. The Judgment of Permanent Court of International Justice in the Mavrommatis Palestine Concessions which was requested by Government of Greek Republic and against the Great Britain in 1924. Case concerning the Mavrommatis Palestine Concessions, *Greece v. Britain*, Aug. 30, 1924. PCIJ, Ser. B., No. 3, 1924.

³⁷ Water resources management is the integrating concept for a number of water subsectors. Use of an integrated water resources perspective ensures that social, economic, environmental, and technical dimensions are taken into account in the management and development of surface waters (rivers, lakes, and wetlands) and groundwater. Water Resource Management. *World Bank Online Publication*, Available at

the physical process, available data, and expertise. Therefore, uncertainties as well as scarcity are typically the reasons why conflicting scenarios arise among stakeholders.³⁸

According to Wolf, when a river basin traverses across multiple legal, political, and international boundaries, the number of potential stakeholders and their specific interests increase making the conflict solution process increasingly complicated.³⁹

The nature of conflicts varies, as different situations may lead to different types of conflicts. In the past, different interpretations over the use of international fresh water resources have generated a great number of international conflicts in various parts of the world, most significant have been those conflicts over access to water resources in arid regions where there is not enough water available to satisfy all needs.⁴⁰ To describe the range of possible conflicts; sometimes it is minimised by the riparian States to such a low level as to be regarded a “standard dispute” and a way to long-term cooperation. This is especially likely when there is a convergence in political direction in the government of the riparian States in dispute, as was the case with the 30 year Ganges water agreement in which both India and Bangladesh have finally guarantee each other a fair share.⁴¹ However, in many cases, the cumulative demand on water by different users of a shared watercourse exceeds the total volume of available water. In some extreme cases, over-exploitation of the river by upstream States could result in a situation where downstream States are prevented from enjoying a fair share of the

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTWAT/0,,contentMDK:21630583~menuPK:4602445~pagePK:148956~piPK:216618~theSitePK:4602123,00.html>, accessed 25 April 2009.

³⁸ Nandalal, K. D. W., 2003. State-Of-The-Art Report On System Analysis Methods For Resolution Of Conflicts In Water Resources Management. *PCCP Publications*, at p. 3. Available at http://www.unesco.org/water/wwap/pccp/disciplinary_studies.shtml, accessed 13 September 2007.

³⁹ Wolf, *Supra*, footnote 13, at pp. 251-252.

⁴⁰ Haftendorn, *Supra*, footnote 2, at p. 61.

⁴¹ *Ibid.*, p. 64.

beneficial uses of the water⁴² that could lead to violence. There are not many examples of such a scenario.

3.4 Definition and theories of Cooperation

Cooperation literally means an instance of working or acting together for a common purpose or benefit.⁴³ In the Jordan River case, the overall spirit of the transboundary water agreement is one of cooperation. The areas mentioned therein specifically include, development of existing and new water sources and increasing the water availability, prevention of contamination of water resources, mutual assistance in the alleviation of shortages, transfer of information and joint research and development in water related subjects.⁴⁴ Cooperation over transboundary water can be after various levels of conflicts; or sometimes conflict was outweighed by cooperation. For example, in the past fifty years, there have been thirty-seven cases of reported violence between States over water, of which seven took place in the Middle East. At the same time more than two hundred treaties on water were negotiated between countries in the same period, says the Human Development Report.⁴⁵

Throughout history, cooperation over shared water resources has been the rule, not the exception. It is argued that with more people than ever competing for resources, more ambitious and less fragmented approaches to water governance are in the interest of everyone's long-term security.⁴⁶ However, cooperation will not come about quickly if the asymmetrical nature of transboundary water conflicts is not internationally

⁴² Vinogradov, Wouters & Jones, *Supra*, footnote 14, at p. 22.

⁴³ Garner, *Supra*, footnote 35.

⁴⁴ Haddadin, Munther., 2003, Jordan River Case Study: The Negotiations and The Water Agreement Between The Hashemite Kingdom of Jordan and The State of Israel. *PCCP Publications* 15, at p. 1. Available at <http://webworld.unesco.org>, accessed 28 March 2007.

⁴⁵ Beyond scarcity, *Supra*, footnote 12, at p. 221.

⁴⁶ Haftendorn, *Supra*, footnote 2, at p.54.

recognised. Focusing on the social, political, geographical, historical and economic circumstances of each State will challenge the one-size-fits-all approach that is so common in development cooperation circles and generally fails to meet expectations for cooperation.⁴⁷ Here, it becomes imperative to examine the relationship between international politics and international law once the type of conflict applicable to the thesis is identified.

3.5 Types of conflicts over water resources

Experts have overwhelmingly classified conflicts over water resources into three categories; they are conflicts over quantities of water, conflicts over quality of water, or conflicts over both the quantity and quality of water. The first, sometimes termed “conflicts over water use” arises from the lack of accessible water due to extreme drought climate or arid condition, like the case of Mexico,⁴⁸ or lack of water available for human consumption, irrigation or power generation, in a less arid climate, like the case of Jordan and the Nile.⁴⁹

Conflicts over water quality generally arise where pollution occurs as a result of certain water uses; this may be the case in dry or rainy climates, such as the Rhine River case.⁵⁰

However, when conflicts occur over both the quantity and quality of water arises,

⁴⁷ Allan, J. A., 2002. Hydro-Peace in the Middle East: Why no Water Wars? A Case Study of the Jordan River Basin. *SAIS Review*, XXII (2), at pp. 267-268. Available at <http://www.soas.ac.uk/waterissues/papers/file38388.pdf>, accessed 12 January 2007.

⁴⁸ Haftendorn, *Supra*, footnote 2, at p.59.

⁴⁹ With a length of approximately 6,800 kilometres from its most distant source in Burundi in Central Africa to the Egyptian Mediterranean coast, *the Nile* is the world's longest river. Egypt, Sudan, Ethiopia, Eritrea, Burundi, Kenya, Rwanda, Tanzania, Democratic Republic of Congo and Uganda are the ten riparian States of the Nile river system. Allan, A. J., 1999. The Nile Basin: Evolving Approaches To Nile Waters Management. *Water Issues Group, SOAS, Occasional Paper*. Available at http://www.wca-infonet.org/servlet/BinaryDownloaderServlet?filename=1061984095605_Management.pdf, accessed 12 February 2008.

⁵⁰ Besides the production of electricity and shipping, rivers and lakes also serve an industrial purpose. Not only do they act as reservoirs for the supply of fresh water but also as a means of disposing of waste and industrial rubbish. With the increasing decline in the quality of the water crossing borders, the problem of cleaning water takes on an international dimension. Haftendorn, *Supra*, footnote 2, at p.54.

whatever climate and hydrology or economies are involved, the nature of the conflicts will be multi-dimensional and will carry complex social, political and geographical issues. The nature of the conflict over the Tigris and Euphrates River Basin between Turkey, Syria and Iraq is a good example of this type of conflict. Various factor have led to poor governance between the riparian States of the TERB. Zeitoun and Warner have highlighted that “poor governance of international transboundary water resources often results in water conflicts of varying intensities.”⁵¹

3.6 Cooperation under International politics

In the hydropolitical context, managing shared water can be a force for peace or conflict, but it is politicians who decide which course is chosen.⁵² Given that development is about prioritisation, it is a profoundly political process because it determines who gets what, when, where and how.⁵³ The reason for emphasising politics in relation to water law in this section is that, as Mollinga mentions, “we still live in an era in which it is necessary to explain that water resources management is an inherently political process.”⁵⁴

In the context of the international politics, although no international sovereign body like the UN stands ready to enforce the terms of international agreements, States can realise their common interests,⁵⁵ even though cooperation can be difficult.⁵⁶ Therefore,

⁵¹ Zeitoun, *Supra*, footnote 1, at p. 1.

⁵² Beyond scarcity, *Supra*, footnote 12, at p. 203.

⁵³ Turton, Anthony R., 2005. Water as a Source of Conflict or Cooperation: The Case of South Africa and its Transboundary Rivers. *Gibb-SERA CSIR Report No: ENV-P-CONF*, at p.1. Available at http://awiru.co.za/pdf/6Turton%20Tufts_water%20as%20a%20source%20of%20conflict%20or%20cooperation.pdf, accessed 22 October 2007.

⁵⁴ Mollinga, Peter P., 2005. Water Policy–Water Politics: Social Engineering and Strategic, Action in Water Sector Reform. *Centre for Development Research, Research Group, ZEF Working Paper Series*, (19), at p. 6. Available at http://www.zef.de/fileadmin/webfiles/downloads/zef_wp/WP19_Mollinga.pdf, accessed 21 October 2007.

⁵⁵ Game theorists and oligopoly theorists have long noted that cooperation becomes more difficult as numbers increase. Functionalist analysts of regimes suggest strategies for increasing the likelihood and

governments try to bind themselves to mutually advantageous courses of action through tacit cooperation, formal bilateral and multilateral negotiation, and the creation of international regimes.⁵⁷ Thus, it can be argued that when conflicts between two or more States occur, the States may not have aggressive intentions.

The pattern of such argument comes from everyone's first choice of cooperation. For example, water management of the Jordan River since the 1990s, which ensured that water remained high on the agenda in both Palestine and Israel, despite the overwhelming social and security disruptions since September 2000,⁵⁸ is an example of State's intention to cooperation. In South America, Brazil and Paraguay resolved a 100-year-old boundary dispute by signing the Itaipu Accord.⁵⁹ The Southern African Development Community has led a process of basin-wide cooperation for the region's fifteen transboundary rivers, focusing on collecting information and developing infrastructure to improve energy and food security for the vulnerable in addition to strengthening the capacity of river-basin organisations to protect their quality of and access to water.⁶⁰ All are a good example of State's mutual intention to cooperate.

robustness of cooperation given large numbers of actors; analysts of *ad hoc* bargaining in international political economy suggest strategies of bilateral and regional decomposition to reduce the number of actors necessary to the realization of some mutual interests, at the expense of the magnitude of gains from cooperation. Kenneth, Oye A., 1985. Explaining Cooperation under Anarchy: Hypotheses and Strategies. *World Politics* 38(1), at pp.1-2.

⁵⁶ Wagner, Harrison R., 1983. The Theory of Games and the Problem of International Cooperation. *The American Political Science Review*, 77(2), at p. 330. There are no cases of world government, world federation, or even a worldwide pluralistic security community. Jervis, Robert., 1985. From Balance to Concert: A Study of International Security Cooperation. *World Politics*, 38(1), at p. 59.

⁵⁷ Kenneth, *Supra*, footnote 55, at p. 2.

⁵⁸ Allan, *Supra*, footnote 49, at pp. 267-268.

⁵⁹ Financed largely by Brazilian investment, the Itaipu dam became one of the world's largest hydropower plants, meeting a quarter of Brazil's energy consumption and serving as Paraguay's largest source of foreign-exchange earnings.

⁶⁰ However, it has been proven in the South African case, it is yield evidence to suggest that when ideology has clouded the decisions in water resource management, and then progress towards a cooperative solution is significantly hampered. Turton, *Supra*, footnote, 66, at p.191.

In support of the earlier argument that cooperation still remains difficult and requires hard work there are two points: firstly, as the number of actors increases, cooperation becomes more difficult, which necessitates strategies for promoting cooperation among a smaller number of actors on specific points of common interest.⁶¹ Secondly, the actions of States betray a psychological configuration in favour of hegemony and overtly demonstrates hegemony as an inherent character of State.⁶²

When a stronger State does not demonstrate sufficient endeavours towards cooperation and chooses a hidden “no-responses policy” with the purpose of achieving its goals, it can be described as hegemony, or in the context of water issues hydro-hegemony; as will be explained in the next subsection. Subsequently, unilateral cooperation by the other State will court disaster as the cooperating State will be left in a state of uncertainty about other States’ intentions, and this will lead to further defensive non-cooperation.⁶³ Hence, the weaker States need to increase their power to compel the hydro-hegemon riparian to give some consideration to cooperation. Such an ambition could be achieved if certain measures are taken to balance the powers in the region. The next subsection will discuss both theories of hegemony and hydro-hegemony, and balance of power in order to determine the role of international law in strengthening Iraq’s right to its shared water with Turkey and Syria.

⁶¹ Kenneth, *Supra*, footnote 55, at pp.2-3.

⁶² Although the forms of power have altered during the evolution of the State system, it has been generally thought that States are motivated by a drive for power, no matter what the stakes are. Coplin, W. D., 1965. International Law and The Assumptions about the State System. *World Politic*, 17(4), at p. 618.

⁶³ Wagner, *Supra*, footnote 56, at p. 330.

3.6.1 *Hydro-Hegemony v. Balance Of Power Theory*

Within international politics, powerful countries seek to construct international political economies through converting resources into outcomes.⁶⁴ As well as political will, access to crucial raw materials, including full access to transboundary water resources, is vital in order for a State to increase its power in a particular region.⁶⁵ These are the elements to achieve a status referred to as a 'State's hegemony'.⁶⁶ Vickers presented the status of hegemony as "that which takes account of the interests and tendencies of the groups over which hegemony is to be exercised so that certain equilibrium can be reached."⁶⁷ It is nonetheless concluded that in a hegemonic system, a State is able and willing to determine and maintain essential rules by which relations among States are governed.⁶⁸ Thus, it can be stated that a hegemonic State can not only abrogate existing rules to prevent the adoption of rules it opposes, but it can also play the dominant role in constructing new rules⁶⁹ that may prejudice the rights of other States.

In many transboundary river basins, political power is asymmetrically distributed, which has given rise to the concept of 'hydro-hegemony'. This is where a particular riparian maintains a dominating position within a basin, in the absence of a basin wide agreement, and comes to the position of receiving more than its equitable share of the

⁶⁴ Vasquez, J. A., 1996. *Classics of International Relations*. New Jersey, Printice Hall, Upper Saddle River, 1996), at p. 357.

⁶⁵ Other factor that make a State hegemonic in the world political economy are controlling major sources of capital, a large market for imports, and comparative advantage in production of goods with high value added. Ibid., at p.355. As they are not relevant to the thesis, they will not be discussed.

⁶⁶ The concept of hegemony has been widely used in international relations, and more recently, international political economy literature to analyse the post-war world order. Vickers, R., 2000. *Manipulating Hegemony, State Power, Labour and the Marshall Plan in Britain*. London, Houndmills, Basingstoke, Hampshire, at p. 7.

⁶⁷ Ibid., at p. 9.

⁶⁸ Russett, B. Starr, Harvey & Kinsella, David., 2000. *World Politics, The Menu for Choice*. Boston, New York Bedford/St. Martin's, at p. 361.

⁶⁹ Ibid.

available water resources.⁷⁰ The hydro-hegemony framework identifies the factors behind each State's ability to use these resource-control strategies. For example, countries exercise power through military or economic means, by providing incentives for weaker countries to comply, or using propaganda to justify control.⁷¹

A particular riparian position within a river basin whether upstream or downstream will not necessarily determine whether a State becomes a hydro-hegemon. However, it is interesting to observe that two major river basins are dominated by hydro-hegemons who are upstream riparian States; Turkey maintains a hegemonic stance in relation to the Tigris and Euphrates Rivers, and China has a similar role in the Mekong River system.⁷² In such circumstances, Turkey as the upstream riparian state of the TERB may fall in the position of using the available water to wield more power.⁷³ Similarly, Israel has taken a dominant position in relation to the waters of the Jordan River basin from a mid-stream vantage point, whilst the extreme downstream State of Egypt is clearly the hegemon in the Nile River basin.⁷⁴ In such a downstream position, Egypt uses other forms of power such as the threat of military action or exercise of political power to get more water and has used delaying tactics in the past to prolong its dominant position.⁷⁵

Regarding cooperation at the TERB level of the Tigris and Euphrates, Kirstin, Phillips, and Woodhouse describe the Turkish hydro-hegemony as patronising and lacking any

⁷⁰ Jägerskog, Anders & Phillips, David, 2006. Managing Trans-boundary Waters for Human Development. *Occasional Paper, Human Development Report*, at p, 8. Available at <http://hdr.undp.org/en/reports/global/hdr2006/papers/Jagerskog%20Anders.pdf>, accessed 26 January 2008.

⁷¹ Zeitoun, *Supra*, footnote 1, at pp. 1-2.

⁷² Jägerskog, *Supra*, footnote 70, at pp. 8-9.

⁷³ Zeitoun, *Supra*, footnote 1, at pp2-3.

⁷⁴ Jägerskog, *Supra*, footnote 70, at p. 8.

⁷⁵ Zeitoun, *Supra*, footnote 1, at p. 3.

clear goal, and lacking any form of co-riparian States' institutional mechanism⁷⁶ which leaves sufficient leeway Turkish hydro-hegemony to grow.

Jervis believes that, in the contemporary political world, States take advantage of any opportunity to make competitive gains at others' expense; but when their immediate interests are threatened, they jump to consult other States and employ tactics of surprise and duplicity,⁷⁷ leaving little room for the international law of shared responsibility, or the necessity to preserve the States' rights and obligations. Based on this argument, it can be said that Turkey plays the role of Rambo in the region. The Rambo situation denotes a circumstance where State or States control a river's source or flow, placing the downstream riparian States at a disadvantage. As such, the controlling State or States profit from this situation and it is in their interests to maintain the status quo and not to reach an understanding with the weaker Riparian State or States.⁷⁸ The US-led invasion of Iraq was another factor that consolidated Turkey's status as hydro-hegemon and contributed towards prolonging the status quo.

Thus, if the concept of hegemony or hydro-hegemony connotes the dominance of one State over another, in order for the former to maximise its power, there is little room for international law to function properly since this necessitates the balance of power. For Russett, States need to cooperate and interact in a regularised manner particularly in the context of contemporary global economic and environmental issues that require action

⁷⁶Kirstin, Phillips & Woodhouse., 2004. Intensity of Cooperation/Intensity of Conflict. *Second International Workshop on Hydro-Hegemony, Briefing Paper 3, London Water Research Group*, at p. 5.

⁷⁷ Jervis, *Supra*, footnote 56, at p. 718.

⁷⁸ Haftendorn, *Supra*, footnote 2, at p.52.

by more than one State.⁷⁹ Coplin believes that such regulation can curtail the State's drive for power⁸⁰ provided that international law is adhered to.

Jervis regards the 'balance of power' as too simplistic; that it should be seen as being much more varied, drawing excessively stark contrasts between balance and a managed system.⁸¹ The word 'balance' calls for restraint, and the denial of immediate self-interest, which requires the subordination of State's interest to 'balance of power'.⁸²

In applying the theory to the regional context of the TERB, one can suggest that the occupied and currently weak Iraqi State and a less weak Syrian State may be in the position to join together in coalition to dispute the potential Turkish hydro-hegemony so that water supplies for both downstream states can be secured. However, it is not the purpose of the thesis to foster political issues between the riparian States, but to review the application of the theory in the political world in order to examine the role of international law in conveying the balance of power from the legal standpoint.

It is easy to assume that in the balance of power theory there is the likelihood of war against a potential hegemon. However, war is no longer seen as a normal tool of statecraft, because experience has shown long-term fighting can forge unusual bonds between the States, such as the Iraqi-Iranian War from 1980 to 1988.⁸³ Accordingly, to avoid further wars, diplomacy has eased the pressure of checking power by power; the

⁷⁹ Russet, *Supra*, footnote 68, at p. 465.

⁸⁰ Coplin, *Supra*, footnote 62, at p. 618.

⁸¹ Jervis, *Supra*, footnote 56, p.716.

⁸² This pattern characterises the balance of power is that States are observing external factors by what others are doing, or at least by the anticipation of what others will do if they act against the others' interests. The good thing of the balance of power is that no State gains dominance, wars do not become total to the level of unconditional surrenders. *Ibid.*, p.719.

⁸³ The Iran-Iraq War was an extremely costly war, which permanently altered the course of Iraqi history. It strained Iraqi political and social life, and led to severe economic dislocations. *Iraq-Iranian Conflict. Nations Encyclopaedia, A Country Study, Country Data, Iraq*. Available at <http://www.country-data.com/>, accessed 23 February 2008.

need to maintain new and more cooperative arrangements has become more important to States despite significant conflicts of interest between States.⁸⁴

In summary, effective international relations support the transformation of potential conflicts into cooperation potential. The reason is that the concept of self-interest has evolved, and states now prefer to keep close friendly relationships with each other. While the balance of power is individualistic in its premise that each State will try to advance its own interests, the cooperation theory requires that States not only think of their own survival, but are also willing to interchange benefits and trust other States, whom they expect to act the same. In such circumstances a high level of regulated and mutually reinforcing behaviour will be required in order to reassure the weaker parties, which in turn requires national leaders to attend not only to possible threats to themselves but also to whether their actions-or inactions-threaten the vital interests of others and thereby the entire system.⁸⁵ Such a system to maintain States' behaviour is regularised today by international law, which will be discussed in the following section.

3.6.2 *International Law v. Balance of Power Theory*

As explained earlier, international politics is a struggle for power and as such all States seek to increase their power.⁸⁶ However, since the nineteenth century⁸⁷ international law

⁸⁴ Jervis, Robert., 1992. A Political Science Perspective on the Balance of Power and the Concert. *The American Historical Review* 97(3), at p. 719.

⁸⁵ Ibid., p. 724.

⁸⁶ Although the forms of power have altered during the evolution of the State system, it has been generally thought that States are motivated by a drive for power, no matter what the stakes are. Coplin, *Supra*, footnote 62, at p. 618.

⁸⁷ Bentham was the first philosopher to identify the rights and obligations of States for our modern time. In his philosophical principles, known as Utility General, he said: First Object, Utility general, in so far as it consists in doing no injury to the other nations respectively, having the regard which is proper to its own well-being. Second object:- Utility general, in so far as it consists in doing the greatest good possible to other nations, saving the regard which is proper to its own well-being. Third object:- Utility general, in as far as it consists in the given nation not receiving any injury from other nations respectively, saving the regard due to the well-being of these same nations. Fourth object:- Utility general, in so far as it consists in such State receiving the greatest possible benefit from all other nations, saving the regard due to the well-being of these nations. It is to the two former objects that the duties which the given nation ought to

has been characterised as a collection of rules governing relations between States relating to their rights of self-preservation, sovereignty,⁸⁸ independence, legal equality and security in their territorial possessions,⁸⁹ which will be elucidated in Chapter Four. In order to meet all these rights for all the member States simultaneously, rules to impart a degree of order, predictability and stability to relations are essential.⁹⁰

By the early twentieth century those principles became more settled, particularly as inter-State legal and political relations developed, and the idea of how to manage all those relationships was born. After World War II, in order to maintain international peace and security,⁹¹ international law was thought of as a “body of rules” which are accepted by the nations,⁹² required as an instrument of direct control.⁹³ All these factors led to the establishment of the UN in 1945.⁹⁴

Today, the purpose of international law is understood as a degree of order resulting from two fundamental principles. Firstly, security is the primary immutable imperative

recognise may be referred. It is to the two latter that the rights which it ought to claim may be referred. Janis, M. W., 1984. Jeremy Bentham and the Fashioning of “International Law”. *The American Journal of International Law* 78(2), at pp. 405-418. also Bentham, J., Objects of International Law. *Essay I*. Available at <http://www.laits.utexas.edu/poltheory/bentham/pil/pil.e01.html>, accessed 19 February 2006.

⁸⁸ Sovereignty will be discussed in more details in the next chapter.

⁸⁹ Fenwick, Charles G., 1918.Codification of International Law. *The American Political Science Review* 12(2), at p. 302.

⁹⁰ Charney, J. I., 1993.Universal International Law. *The American Journal of International Law* 87(4), at p. 532.

⁹¹ Nowadays international peace and security is set forth today in the purposes of the Charter of the UN.

⁹² The term ‘acceptance by the nations’ is evidenced by their formal statements and consistent usage, and considered *opinio juris* and State practice. Fenwick, *Supra*, footnote 121, at p. 302. *Opinio juris* and State practice will be discussed in detail later in the next chapter.

⁹³ Writers of this conception derived their arguments on the way law functions in domestic communities are the same applicable analogy of the relationship between international law and political action. So for them international law should develop friendly relations among nations, cooperate in solving international economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms, and to be a centre for harmonizing the actions of nations.

Coplin, *Supra*, footnote 62, at pp.617-618.

⁹⁴ The Charter of the UN was signed on 26 June 1945, in San Francisco, at the conclusion of the UN Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter. U.N. Charter, Jun. 29, 1945 (entered into force Oct. 24, 1945), 1 U.N.T.S. xvi

for State action.⁹⁵ Notwithstanding certain limits to what can be accomplished due to the decentralised character of international law, international law has an important role to play.⁹⁶ Secondly, the international system is a method of maintaining a minimal system of order among States.⁹⁷ Thus, in order to avoid conflict that could disrupt the system, international law legitimises forming coalitions to counter any threat of hegemony,⁹⁸ in order to achieve the balance of power. Based on such an argument, both Iraq and Syria can become allies against Turkey on the legitimate ground of preventing Turkish hydro-hegemony so as to maintain equilibrium between downstream States Iraq and Syria, and upstream State Turkey.

3.6.3 Evolution of international water law

Just as international law has developed over the last century, so has international water law. Over time, customary rules developed with regard to riparian rights to international rivers, although these were not extensive.⁹⁹ Custom played an important role in international relations among States concerning the development, conservation and the use of the water resources of international or shared rivers and basins.¹⁰⁰ Inter-governmental relations concerning river basins have further developed according to

⁹⁵ Coplin, *Supra*, footnote 62, at p.618.

⁹⁶ Charney, *Supra*, footnote 90, at p. 532.

⁹⁷ For that purpose the UN established, in Article 1 of its Charter that the purposes that the purpose of the United Nation is: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

⁹⁸ Coplin, *Supra*, footnote 62, at p. 616-617.

⁹⁹ Shaw, M. N., 1997. *International Law*. (4th Ed). Cambridge University Press. at p. 616.

¹⁰⁰ Caponera, Dante A., 2003. *National and International Water Law and Administration*. Netherlands, Kluwer Law International., at p. 176

certain water uses¹⁰¹ such as transportation, irrigation, and domestic uses.¹⁰² State practice on those issues developed into customary principles concerning the freedom of traffic on international waterways, the border between opposite riparian States, the control of water flow, and related maintenance works.¹⁰³ The main impetus for the progressive development of international water law was that States needed to develop their resources.

After World War II, State governments had to be prepared to participate actively in any program of rehabilitation which may be necessary.¹⁰⁴ Since much of the war took place in Europe, the Western European States were especially badly affected, regardless of who were the winners or losers in the war. It was suggested that they delivered economic growth at a pace that the world had never before seen, which allowed remarkable progress through the final stages of structural transformation to an industrial economy and society.¹⁰⁵ To meet such a goal, they needed to strengthen the institutional mechanisms to regulate their intergovernmental relations, and particularly how to share and utilise their transboundary water. Thus, one could argue that customary international water law developed in tandem with the said transformation process in Europe.

¹⁰¹ Ibid, at p. 177.

¹⁰² In those days, international law and practice did not distinguish between sovereignty upon rivers and lakes and the private property of the prince. International law principles relied upon private law principles regulating the rights of neighbouring landowners living in agricultural communities for a primitive type. Ibid.

¹⁰³ Ibid.

¹⁰⁴ During the World War II, calls for stopping the war spread worldwide, it was proposed that every State should do everything in its power to pay off as many of its debts as possible, to economize and otherwise to improve its financial condition so as to be in as strong a financial position as possible, when the war ends, to launch a vigorous program designed to combat unemployment and other problems which it may be called upon to assist in solving. Ice, Willard & Stickgold, Simon., 1942 .The Role of State Governments in the Post-War Era. *The American Political Science Review*, 36 (6), at pp. 1103-1108.

¹⁰⁵ Bradford, DeLong, J., 1997. Post-WWII Western European Exceptionalism: The Economic Dimension. *University of California at Berkeley, and National Bureau of Economic Research*. Available at http://www.j-bradford-delong.net/Econ_Articles/ucla/ucla_marshall2.html, accessed 11 March 2008.

In the Middle East, however, the impact of the World War II was not as great as in Europe, and the downstream States of Iraq and Syria were still underdeveloped. While Turkey, the upstream State was not strong enough in implementing policies to join the industrialised world until the late 1960s.¹⁰⁶ After the end of Cold War, Gulf Wars I and II, and the wave of globalisation, the States of the region found incentives in joining the new competitive world economy. Hence, intergovernmental relationships became crucial for the management of their transboundary natural resources. Again, water plays a major role in the development of their economies. The States in the Middle East are far behind the European States in implementing customary international water law, thus there is a need to emphasise the role of international law and international water law in the regional context.

Customary international water law started to get more attention in Europe notwithstanding that serious international river disputes took place elsewhere,¹⁰⁷ raising the question, what is the law on the utilisation of an international river?¹⁰⁸ The question led the International Law Association (hereinafter ILA) to begin its work on the law governing the utilisation of international fresh water resources in 1954.¹⁰⁹ The ILA is a private organisation of international lawyers,¹¹⁰ and a professional organisation which has made a significant scholarly contribution to the enrichment of the law of international water resources by adopting the 1966 Helsinki Rules.¹¹¹ The 1966 Helsinki

¹⁰⁶ Lack of such development was partially that the Turkish State was still under recovery process due to the collapse of the Ottoman Empire in 1924.

¹⁰⁷ For example, the dispute between India and Pakistan over the Indus, Between Egypt and the Sudan over Nile, between Israel and its neighbours over the Jordan, and Between the USA and Canada over the Columbia. Bogdanovic, Slavko., 2001. *International Law of Water Resources, Contribution of International Law Association (1954-2000)*. London, Kluwer Law International, at p. 3.

¹⁰⁸ Bourne, C. B., 1997. *International Water Law. International Law of Water Resources, Contribution of International Law Association (1954-2000)*. London, Kluwer Law International, p. 233.

¹⁰⁹ Ibid.

¹¹⁰ Shaw, *Supra*, footnote 99, at p. 616.

¹¹¹ Kaya, Ibrahim, The Euphrates-Tigris basin: An overview and opportunities for cooperation under international law. Available at <http://ag.arizona.edu/OALS/ALN/aln44/kaya.html#geography> accessed 28

Rules, furthermore, identified the basic rule on the subject: the principle of equitable utilisation¹¹² and the beneficial use of the waters, and that all States are obliged to prevent new forms of water pollution that could cause substantial injury in the territory of other basin States.¹¹³

3.7 Conclusion

It is noteworthy that water not only does not respect transboundary limits, but has evaded institutional and legal generalisation. Directly or indirectly water can be expressed as conflict-sensitive natural resource particularly in the strategic location of Middle East. The main cause is the region's arid climate with only one percent of the world's available fresh water, geological and hydro-geographical diversities between the riparian States.

The water shortages faced by Iraq as a result of devastating wars and economic sanctions prompted many States in the Middle East to implement national water security programmes to prevent a similar occurrence in their territories. As a result, States are endeavouring to secure more water with less consideration to the possible negative impacts on the co-riparian States, which leads to conflict. However, it is only when the riparian States are willing to work together to find solutions to such conflicts that the meaning of cooperation will become evident. The spirit of cooperation is stifled by

February 2008. *also Helsinki Rules on the Uses of the Waters of International Rivers*, adopted by the ILA at the 52nd Conference, Helsinki, Finland, Aug 1966, *reprinted in* Bogdanovic, Slavko., 2001. *International Law of Water Resources, Contribution of International Law Association (1954-2000)*. London, Kluwer Law International.

¹¹² Article IV of the Helsinki Rules provides: Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the water of an international drainage basin. Bourne, *Supra*, footnote 140, at p. 281.

¹¹³ Shaw, *Supra*, footnote 99, at p. 616. Pollution includes "any artificial change in the natural quality of any particular natural water," rather than a more narrow definition in terms of use or damage. These are only preliminary definitions, and they are not, of course, intended to delimit the area of international legal liability. Lester, A. P., 1963. River Pollution in International Law. *The American Journal of International Law*, 57(4), at p. 829.

hegemony, and only a balance of power between States can reduce this barrier. In the case of Tigris and Euphrates River Basin, a set of complicated legal, political and geographical issues are identified exacerbated by a poor perception of the role of international law and lack of legal institutions to govern the TERB. It can be argued that this has yet further impeded cooperation between the advantaged and disadvantaged riparian States.

In the political world, it is true that States are psychologically tempted to power. When a State is controlling crucial resources and particularly water resources with stronger economic and military power compared to the co-riparian States, the controlling State can easily exercise hegemony, as can be obviously seen in the regional context between Turkey, Syria and Iraq. At the upstream level, the researcher concluded that Turkey has the tools to exercise hydro-hegemony, which makes the case necessary to recourse to the role of international law in this context.

Next Step

Having examined the present literature on the relevant political theories in the regional context of the TERB, there is a lack of emphasis on the applicable international law on water resources management at the TERB level. Whether or not this situation is a deliberate choice by the riparian States is irrelevant. Chapter Four will re-examine the role of international law in improving such circumstances. This will be done through examining what is international law, subjects, sources, enforcement of international law, while the examinations of all political theories and applications will be ignored.

CHAPTER FOUR

APPLICABLE INTERNATIONAL LAW TO THE RIPARIAN STATES OF THE TERB

4.1 Introduction

The topic of international law is too broad to be discussed fully in this thesis; however, the relevant literature on international law in the context of the main thesis question and hypothesis is discussed here. When considering the sharing of transboundary water resources between the riparian States, there is a clear international element which must be properly understood. Accordingly, this Chapter will examine State's rights and obligations under international law. In this context, the Chapter will consider what rights and obligations apply to Iraq according to the principles of international law for the management of its shared fresh water resources. This will be followed by examining subjects, Iraq's sovereignty as a new Federal State,¹ but under occupation, sources and enforcement of international law.

4.2 General background of International Law

The term international law has been defined by Hiller as "the body of rules, which are legally binding on subjects of international law in their intercourse with each other."² In a broader statement, Shaw described international law in this way, "...basically international agreements create binding rules upon the signatories, whereas customary rules are supplementary patterns of conduct to which one must comply".³ From Shaw's perspective, international agreements along with the customary international law are the

¹ The New Iraqi Constitution, state that "Article (1): The Republic of Iraq is an independent, sovereign nation, and the system of rule in it is a democratic, federal, representative (parliamentary) republic." *Constitution of Federal Republic of Iraq*, 2005, reprinted at http://www.uniraq.org/documents/iraqi_constitution.pdf, [accessed 23 February 2010].

² Hiller, Tim., 1998. *Sourcebook on Public International Law*. London, Cavendish Publishing Ltd, at p.5.

³ Shaw, M. N., 1997. *International Law*. (4th Ed). Cambridge University Press, at p. 6.

most important elements of international law. The term “signatories” converts those States that sign a particular rule from being exempt from the rule to being bound and subject to it. For example all the signatory States of the UN Charter, which governs general international law, are bound by the Charter which further make them subjects of international law. Verdross stated;

“Study of the relations between general or universal international law, binding upon all States, and the Charter of the UN seems at first sight to be a very simple question. For the Charter was agreed upon in the form of an international treaty binding on the basis of general international law. It therefore pre-supposes the continued validity of general international law; a thesis supported by the presupposition that its Members are subjects of international law.”⁴

Pursuant to the above subject, further researches on the subjects of international law follow.

4.3 Subjects of International Law

It is widely accepted in the field of international law that “States” are the principal subjects of international law.⁵ In theory, a ‘State’ is an institution that politically unifies people occupying a defined territory, and has a government which exercises control over persons and properties within the said territory.⁶ The word ‘State’ is further defined

⁴ Verdross stated further that “The continued validity of general international law is, in fact, expressed in the Charter itself. In the preamble, the UN undertake to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. In Article I, paragraph I, the UN agree to settle their disputes in conformity with the principles of justice and international law. The same idea is found in Article 38 of the Statute of the International Court of Justice, itself an integral part of the Charter. Verdross, A., 1954. General International Law and the UN Charter. *International Affairs* 30(3), at pp. 243-245.

⁵ Hiller, *Supra*, footnote 2, at pp.185-186. There are other subjects of international law other than States such as international organisations and individuals. However, for the purpose of this thesis, the chapter only focuses on States and the primary subjects of international law.

⁶ Brierly, J. L., 1963. *The Law of Nations: An Introduction to the International Law of Peace*. Oxford, Oxford University Press, at p. 127.

as an association of a considerable number of people living within a defined territory, constituted in fact as a political society and subject to the supreme authority of a sovereign. Redman states that “although this explanation was written in 1918, it is still considered to be the most widely accepted and most frequently cited source of the formal definition of Statehood”.⁷

Before the establishment of the UN in 1945, Article 1 of the Montevideo Convention on the Rights and Obligations of States 1933 (hereinafter the MCROS 1933)⁸ specifically defined the word “State” as a person under international law that should possess the qualifications of: (a) a permanent population;⁹ (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.¹⁰ From the general viewpoint of UNWC 1997, Redman emphasises the point that “although only 19 States signed the MCROS 1933, it should be regarded neither as an inefficient, nor conclusive convention, but a standard value should be given to it.”¹¹ Over time, customary practice

⁷ Redman, M., 2002. Should Kosovo Be Entitled to Statehood? *The Political Quarterly*, Blackwell Publishing 73(3), at p. 338-343.

⁸ The Montevideo Convention on the Rights and Obligations of States was a treaty signed at Montevideo, Uruguay on December 26, 1933, at the Seventh International Conference of American States. It was signed by 19 States, 3 with reservations. It later on entered into Force on 26 December 1934. Article 8 reaffirmed by Protocol, 23 December 1936. *The Montevideo Convention on the Rights and Duties of States*, Dec. 26, 1933 (entered into force Dec. 26, 1934), reprinted at <http://www.molossia.org/montevideo.html> [accessed 23 February 2008]

⁹ It was argued that the term ‘permanent population’ had been inserted in order to differentiate between established or fixed populations and nomadic ones. Next, the qualification of a defined territory could be criticised on the grounds that boundaries of some States had not yet been defined. This qualification and the succeeding one were objective facts and thus preferable to qualifications (a) and (d). Explanations on Montevideo Convention, Article 1, Definition of Statehood and Factors Undermining Separatists Claim to Create Separate States. *University of Western Sydney Library*. Available at <http://www.library.uws.edu.au>, accessed 22 February 2008.

¹⁰ As to the last qualification, it is presumed that the term ‘capacity’ in (d) meant legal capacity. which case the application of international law to that State was presupposed. Speech by Mr.. Alfaro. *Summary record of the 9th Meeting*. 1949. ILC Work, A/CN.4/SR.9, at p. 68. Available at <http://www.un.org/law/ilc/index.htm>, accessed 11 February 2008.

¹¹ UNWC 1997 is efficient as long as no serious attempt to codify a definition of Statehood since 1933 is made, conceivably due to States’ reluctance and political concerns to form objective criteria. Redman, *Supra*, footnote 7, at p. 340. However, the argument to make UNWC 1997 inconclusive source is based on customary practice.” One undisputable fact is that for any theory to operate the basic requirements set out in Article 1 of the Montevideo Convention is a prerequisite. There are instances in world history that the claim for Statehood had been successful even without fulfilling these basic requirements. Israel was

has attributed additional criteria to the quality and nature of State, such as independence, self-containment, self-determination and impermeability.¹² Notwithstanding critics¹³ of the above, these discussions build the concept of Statehood in contemporary international law into a clearer form. Although it is not stated in the Draft Declaration on the Rights and Obligations of States (DDROS) 1949,¹⁴ Hiller still considers the four criteria provided under the Article 1 all together as an accurate statement of customary international law¹⁵ The fourth element is the essential condition in order for the first three elements to realise the attribute of sovereignty,¹⁶ which in turn empowers a State to enter into international relations.¹⁷ Finally, Hiller argues that the essential characteristics of a “State” are now well settled,¹⁸ although the UN General Assembly (hereinafter UNGA) found difficulties in agreeing a precise meaning of a “State”.¹⁹ In this case, it is essential to examine the sovereignty of Iraq in the current

admitted as a member state of the UN in May 1949, notwithstanding that its boundaries were not then defined with precision, pending negotiations regarding demarcation. Ibid.

¹²Also it is cited from the GA that the practice of States, judicial decisions, doctrine, legislation and the practice of the UN indicated sufficiently how to re-appreciate certain traditional conceptions of the term ‘State’. *Yearbook of the International Law Commission*. 1949. Report A/CN.4/SR.8, at p. 1. Available at http://untreaty.un.org/ilc/documentation/english/a_cn4_sr8.pdf accessed 1 March 2010.

¹³ It is important to refer to the critics made to the Article of the Montevideo Convention. It was stated that nowadays, the process of recognition of States became much more complicated than before the World War II. At present, the world State practice supports that mere compliance to the requirements set in Article 1 of the Montevideo Convention is totally insufficient to claim Statehood, sine recognition of other States has become the predominant character of the recognition of States. Explanations on Montevideo Convention, *Supra*, footnote 8.

¹⁴ It is noteworthy to mention that at the time of drafting the rights and obligations of States in 1949, by the ILC, no reference to Article 1 of the Montevideo Convention was made. As was pointed out by Mr.. Alfaro that ‘he had avoided devoting an article of his draft to a definition of that type because he had thought the definition of the State had no place in a declaration on the rights and obligations of States. He recalled that in his explanatory note he had indicated that if a country did not satisfy the conditions required for the existence of a State, it was not a State and, consequently, it could not have the rights of a State; on the other hand, if a State existed, that meant that it fulfilled the conditions necessary for its existence and that it could not be called upon to fulfil those conditions’. *Yearbook of the International Law Commission*, *Supra*, footnote 12.

¹⁵Ibid, Article 1.

¹⁶ Article 3, Capacity to Make Treaties, Supplement: Research in International Law.1935.The *American Journal of International Law*, (29), at pp. 705-710.

¹⁷ Hiller, *Supra*, footnote 2, at pp.185-186.

¹⁸ Ibid., at p. 181.

¹⁹ At the time of discussing the Draft Article of the Rights and Obligations of States by the General Assembly in 1949, it was emphasized the difficulty of defining the words “State” and “nation”, and felt that the Commission should thoroughly study the draft Declaration and examine it paragraph by

circumstances of occupation by the foreign power since April 2003. Subsequently, the Chapter will analyse Iraq's key rights, and obligations under international law.

4.3.1 *Sovereignty of Iraq under International Law*

Sovereignty means the exclusive right to exercise supreme political authority,²⁰ for example legislative, judicial, and executive authority over a geographical area, group of people, or oneself.²¹ In reality, sovereignty is criticised for being uncertain and inaccurate from the legal standpoint that is contrary to the theory of social nature of the international system.²² Karnad argues that the concept of sovereignty is not absolute and no State exists in an isolated autarchy, surviving entirely on its own and by itself. Therefore, the exercise of sovereignty becomes limited by international law and by the differential in the power of States.²³ As a result, sovereignty and international law have no choice but to integrate with one other²⁴ given that States consent to become subject of international law,²⁵ and now are creators and enforcers of this law.²⁶

paragraph. Some favoured the inductive method of codifying specific subjects first and deducting general principles from them. *Summary record of the 9th Meeting, Supra*, footnote 12, at p. 63.

²⁰ Coplin, W. D., 1966. *The Function of International Law: An Introduction to the Role of International Law in the Contemporary World*. Chicago, Rand McNally & Company, at p. 172.

²¹ Brus, Marcel Bridging the Gap between State Sovereignty and International Governance: The Authority of Law. in Kreijen, Gerard. (Ed), *State, Sovereignty, and International Governance*. New York, Oxford University Press Inc, 2002, at p. 3.

²² From the standpoint of legal technique, there are a number of difficulties which prevent the notion of sovereignty and analysed at present form being accepted as a valid means of explanation. The concept is regarded as fundamentally anti-juridical, as it is contradictory to speak of a subject of law as being sovereign. Larson, A., 1965. *Sovereignty Within The Law*. London, Stevens & Sons, 1965, at p.48.

²³ Karnad, Bharat., 2008. *Security and Sovereignty, Globalization and Environmental Challenges*. Berlin Heidelberg, at p. 421.

²⁴ It was added that in modern doctrine the interpretation generally given of sovereignty is regarded as contrary to the facts should make common idea of sovereignty false, since every State's sovereignty encounters in the international sphere other sovereignties equal to itself. Such circumstances strips the notion of its positive content, which is the power to give unconditional orders, because of *de juri* equality of States, and of negative content, which is the right not to take orders from any other human authority, because of their *de facto* inequality. Thus, instead of regarding sovereignty as supra-legal concept, the prevailing doctrine has endeavoured to present it as strictly juridical notion, consisting essentially in a power limited by law. *Ibid.*, pp. 48-49.

²⁵ Nijman, J., 2002. *Sovereignty and Personality: A Process of Inclusion State Sovereignty and International Governance*. Oxford University Press, at p. 109.

²⁶ Brus, *Supra*, footnote 21, at p.3.

In the prevailing international system of sovereign States, Karnad advocates that it is the sovereignty of weak States that is most in peril.²⁷ States have always treated sovereignty as an asset to be bargained with; surrendering portions of it in return for substantial benefits or compromising it under duress.²⁸ A good example of this scenario is the Turkish-Syrian relationship in 1998 when Turkey demanded Syria stop sheltering PKK members.²⁹ Only once Syria had complied with Turkish demand, Turkey showed interests for cooperation with Syria in 2001. Several meetings were held between the two States' delegations, which led to an agreement between the GAP Administration and Syrian General Organization for Land Development (hereinafter GOLD). The agreement allows for three training programs enabling Syrian experts to attend international training courses of the GAP, for example.³⁰

Although Iraq is not better than Syria in terms of control and power, but still should enjoy sovereignty over its territories like any other sovereign State, and bound by the UN Charter. Also by virtue of the UN Charter, Iraq should have reciprocal rights and obligations to its neighbours, and be bound by all bilateral and multilateral treaties that it ratified and signed before the fall of Baghdad. Finally, the UNSC Resolution 1483 which reaffirms the sovereignty and territorial integrity of Iraq grants the Iraqi people the right to freely determine their own political future and control their own natural resources.³¹ In fact, when the US-led invasion took place in 2003, a fundamental

²⁷ Karnad, *Supra*, footnote 23, at p. 421.

²⁸ *Ibid.*

²⁹ This Thesis, *infra*, Annex III (1) and (2).

³⁰ It was stated further that GAP will organise custom-made courses to be attended by Syrian experts, and the two parties will organise joint courses. What is remarkable in this agreement is that the name of Euphrates River and its joint management was not explicitly mentioned although Syria is in the most need to solve this matter. This Thesis, *infra*, Annex IV.

³¹ *Resolution 1483*, May 23, 2003. U.N.S.C. at its 4761st meeting, S/RES/1483 (2003), *reprinted at* <http://www.uncc.ch/resolutio/res1483.pdf> [accessed 26 May 2010]

question was posed about the impacts of the occupation and its consequences on Iraq's capacity to freely enter into international obligations. They will be discussed below:

First of all, according to the Regulations annexed to Hague Convention IV 1907 and the Geneva Convention IV 1949, Article 42 of the RHC 1907 provides that a territory is considered occupied when it is actually placed under the authority of a hostile army.³² This would suggest that occupation is therefore a matter of fact, rather than hinging on a declaration by the occupier. In other words, if a territory is actually placed under the authority of another country then it is occupied. In addition, the occupation need not be a matter of controlling the whole of another State's territory, but arises when authority is established over any portion of its territory.³³

Next, Jennings argued that "in a chaotic situation the real power is too often found in the hands of individual and individualistic warlords who are both well armed apparently free to behave both irresponsibly and just as they please. And their ambition of power do not always seem to include any ambition to wield that power as a reasonable government, the result has frequently been so chaotic that it is even inappropriate to dignify by the term 'civil war'."³⁴ Certainly, if Jennings had made this argument after the 2003 US invasion, he would have included similar comments on Iraq.³⁵ Moreover, corruption can be suggested as another form of disorder in Iraq although it is not a new

³² *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, Oct. 18, 1907 (entered into force 26 January 1910), reprinted at <http://www.unhcr.org/refworld/docid/4374cae64.html> [accessed 26 May 2010]

³³ Brown, Paul., 2001. Ilisu dam in jeopardy as Balfour drops out Mortal blow for controversial £1.25bn project flooding Kurds' land. *The Guardian*. November 14. Available at <http://www.guardian.co.uk/uk/2001/nov/14/politics.politicalnews>, accessed March 2007. also Ibid.

³⁴ Jennings based his argument on Bodin's (1576) formulated doctrine of sovereignty, who stated that 'a confusion of uncoordinated independent authorities must be fatal to a State, and that there must be one final source and more than one from which its laws proceed. Jennings, Robert., *Sovereignty and International Law*. in Gerard, Kreijen. (Ed), *State, Sovereignty, and International Governance*. New York, Oxford University Press Inc, 2002, at p. 27.

³⁵ In his argument, Sir Robert Jennings has referred to the current cases in Somalia, East Timor, Rwanda and some other countries in Asia and Africa that currently undergo civil war and chaotic situation. Ibid., at p. 30.

phenomenon. Numerous reports indicate that corruption is rife throughout the entire country, which under Jennings definition would make Iraq as a ‘non-reasonable government’. Corruption is no less serious a problem than civil war; in civil war usually people are the casualties, but in the case of corruption human resources and skills are ravaged. Civil war will destroy communities; while corruption destroys the government institutions by allowing unqualified personnel to abuse the positions they are given.

As a remedy to the above, Article 43 of the RHC 1907 gives an overview of the occupying power’s responsibilities, which states that “the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Article 64 of Geneva Convention IV gives a more discursive statement of the same principle:

“....the occupying power may subject the population of the occupied territory to provisions which are essential to enable the occupying power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the occupying power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”³⁶

In the case of occupation, the occupying power’s authority in relation to the occupied State’s sovereignty significantly affects the latter’s ability to freely enter into international obligations. It is stated that the law on occupation during and after conflict is based on the principle that the occupying power is precluded from alienating sovereignty (effectively, annexing territory) by means of the use of force. It is responsible for administering occupied territory, but it may make changes to existing

³⁶ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Aug. 12, 1949, (entered into force Oct. 21, 1950), 75 U.N.T.S.287, reprinted at <http://www.unhcr.org/refworld/docid/3ae6b36d2.html> [accessed 26 May 2010]

institutions only where necessary for the maintenance of order and security. However, in Iraq the real fact shows that not only certain institutions are changed by the first government, which was established under full supervision of the Coalition forces, but the entire country's structure has been changed. As a result, it can be argued that the present Iraqi government fell under the undue influence of the occupying power that puts Iraq in the dependence circle rather than being a politically independent State. Such a loss of independence for Iraq shifts the onus to the occupying power for protecting Iraq from other States' hegemony especially when refereeing to Iraq's equitable right to water resources, as will be discussed later.

State's peaceful co-existence is another important factor for Iraq.³⁷ As suggested by O'Brien, Iraq should benefit from this doctrine that in essence requests respect for territorial integrity and sovereignty, non-aggression, and non-interference in internal affairs based on the principle of equality of status.³⁸ However, this doctrine does not appear to be practised in the Tigris and Euphrates region. Turkey, the upstream State has recently used military aggression within Iraqi territory, against the PKK militants on from the northern border.³⁹ Although the Turkish Prime Minister Tayyip Erdogan, in his visit to Iraq in 2008, pledged to boost ties with Iraq and urged the region to do more to help the Baghdad government to rebuild the war-torn country, relations between the two States have often been strained by PKK rebels who use northern Iraq to launch

³⁷ Article 4 of the DDRDS 1949 reads 'Every State has the obligation to refrain from intervention in the internal or external affairs of any other State. *Draft Declaration on the Rights and Obligations of States, Fundamental rights and obligations of States*, May 15, 1949, U.N.G.A., 23rd meeting, A/CN.4/SR.19, I., reprinted at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1949_v1_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1949_v1_e.pdf) [accessed 26 May 2010]

³⁸ O'Brien, J., 2001. *International Law*. Routledge Cavendish, at p. 152.

³⁹ John, Mark EU's Solana: Turkey incursion "not best response". 2008. *The Reuters Website*, 22 February. Available at <http://www.reuters.com/article/topNews/idUSL2247927720080222>, accessed 13 July 2008.

attacks into neighbouring Turkey.⁴⁰ However, the Turkish interference in Kirkuk and attacks against the PKK are not the concern of this thesis, but more importantly the Turkish incursion against the Iraq's sovereignty and political integrity disregards Iraq's right of peaceful co-existence with its neighbours.

When discussing the obligations of States prescribed by international law, both the UN Charter and the DDROS proscribe States from resorting to war as an instrument of national policy and from the threat or use of force against the territorial integrity or political independence of another State.

The obligation to peaceful dispute settlement is another important area to discuss. Kelsen considers there to be a process to prevent conflicts and settle disputes by peaceful means imposed by Article 2 (6) of the UN Charter, and Article 8 of the Draft Declaration. However, there is another argument that defends a State's freedom to resolve their disputes over international watercourses by any peaceful means they deem fit. In the case of the TERB, so far there is no treaty completed between the riparian States to establish a dispute settlement mechanism between the riparian States. Thus, it can be considered that there is no legally defined dispute from the very beginning between the riparian States, but it rather can be characterised as discrepancies or conflicts over the Basin. If Kelsen's view is followed, then Article 2 (6) of the UN Charter and Article 8 of the Draft Declaration implicitly stipulate that the riparian States must sign a special treaty to manage the Basin which codifies dispute settlement mechanisms. Alternatively, if a State is free to choose the method of dispute settlement, the issues of power asymmetry between the riparian States bring the negotiation efforts

⁴⁰ Abbas, Mohammed & Wisam, Mohammed., 2008. Iraq and Turk leaders agree to boost ties. *The Reuters Website*, 10 July. Available at <http://www.reuters.com/article/topNews/idUSL0353522920080710>, accessed 25 March 2009.

for cooperation back to the very beginning of the topic. Hence, there is no guarantee that Turkey, the upstream and powerful State will discontinue exercising hegemony.

Finally, co-operation is another obligation under the UN Charter; States have the obligation to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations. Maintaining international peace and security, international economic stability and progress, the general welfare of nations, and the promotion of non discriminative attitudes of the State are the primary reasons behind setting such an obligation.⁴¹ Hence, such an obligation puts Turkey, Syria and Iraq under the international obligation which can enable the drafting of treaties and the mechanism for their application.

If the above State's rights and obligations are not observed, then the entire region will most probably continue in the same quandary and effective co-operation cannot be achieved. This is especially true when one considers that, compared to Turkey and Syria, Iraq is in turmoil in all aspects of economic and infrastructure development that would widen the gap of power asymmetry and hegemony of the stronger State. However, this situation does not negate Iraq's sovereignty but rather makes Iraq weaker to defend or enforce its rights, and despite the US presence, it can be conclude that Iraq does have sovereignty under international law. According to the DDROS 1949,⁴² it is well established that sovereign States enjoy the rights to be independent, equal and live in peaceful co-existence, as discussed below.

⁴¹ *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., 1883rd Plen, mtg., Supp. (No.28), Annex, U.N. Doc. A/Res/2625 (XXV) (1970), reprinted in 9 I.L.M. 1292 (1970)

⁴² DDROS, *Supra*, footnote 27, at p. 135. also De Lupis, I. D., 1978. *International Law and the Independent State*. London, Gower Publishing Company Ltd, at p. 3.

4.4 Rights of States under International Law

To examine Iraq's rights under international law properly, this section specifically will focus on Iraq's legal and political independence, legal equality and peaceful coexistence in three different subsections below.

4.4.1 Legal and Political independence

Independence is the outstanding characteristic of State, as defined in the DDROS 1949.⁴³ Under this declaration, it was stated that every State has the legitimate⁴⁴ right to provide for its own well-being⁴⁵ and to develop free from domination by other States.⁴⁶

Political independence is another criterion of statehood. Political independence under international law means that one State cannot be forced to pursue a certain strategy to satisfy another State because it breaks down both States' rights of equality and peaceful co-existence. As a result, Turkey not to exercise hegemony against Iraq would include pressure to acquiesce to the GAP developments even when they could damage Iraq's development opportunities. An example of this is the dramatic change in the Iraqi Government's position on the Ilisu Dam; from strongly opposing the project to supporting it.⁴⁷ It is generally known that the Iraqi government disagreed with Ilisu Dam Project, fearing future shortages of water from the upper and middle reaches of the River Tigris; in fact, there are many questions relating to the reasons for the change position. Accordingly, it can be argued that the political independence of Iraq falls

⁴³ Article 3 of the Draft reads: Every State has the right to independence and thus to exercise freely, without being subject to the dictates of any other State, all its legal powers including the choice of its own form of government. It is in this sense that States are sovereign.

⁴⁴ Hence, the principle of sovereignty comes into question, as non interventions are essential in the maintenance of a reasonably stable system of competing States. Shaw, *Supra*, footnote 3, at p.152.

⁴⁵ Article 1.

⁴⁶ Article 8.

⁴⁷ Yavuz, Ercan., 2008. Turkey, Iraq, Syria to Initiate Water Talks. *Today's Zaman Newspaper*, 12 March. Available at <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=136183>, accessed 30 July 2008.

under Turkish influence and there is no transparent relationship between the two riparian States.

4.4.2 State's Legal equality

Legal equality of States is another familiar and frequently reiterated principle of modern international law.⁴⁸ The doctrine of equality was introduced into the theory of international law by the naturalist writers.⁴⁹ Every State has the right to equality in law with any other State.⁵⁰ Apart from legal equality, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in 1970 (hereinafter the DPILCFRCS 1970) called for the right of equal sovereignty.⁵¹ Shaw explained that 'legal and sovereign equality' is a concept of law and should not be confused with political equality.⁵² Thus, it is equality of legal rights and obligations; for example, Malta is a sovereign State just as much as is the United States. Hence, within the UNGA the doctrine is maintained by the rule of one State, one vote, irrespective of the realities of power.⁵³ Like any other country, Iraq is enjoying this right by virtue of the UN Charter and therefore no further research is necessary in this aspect.

⁴⁸ Equality ranks traditionally with sovereignty and independence as an inherent and impeachable attribute of the State. Jessup, P. C., 1945. The Equality of States as Dogma and Reality. *Political Science Quarterly*, 60(4), at pp. 527-531.

⁴⁹ Naturalist writers argued that as men in the "State of nature", that is to say before their entry into the political State, were equal to one another, and as States are still in a "State of nature", therefore, States must be regarded as equal to one another. Brierly, *Supra*, footnote 6, at p.131.

⁵⁰ Article 5 of the Draft Article.

⁵¹ DPILCFRCS, *Supra*, footnote, 41, at p. 124.

⁵² It was recognised in the 1970 Declaration on Principles of International Law that all States enjoy sovereign equality. They have equal rights and obligations and are equal members of international community, notwithstanding differences of an economic, social, political or other nature. Shaw, *Supra*, footnote 3, at p.153.

⁵³ *Ibid.*, at p.153.

4.4.3 State's right to peaceful coexistence

Peaceful co-existence is the third profound right of States.⁵⁴ It has been developing over the last twenty or more years. Its preservation obviously is related to political developments and the recognition that the world system emerging gradually from a bipolar Soviet-American context into a rather less secure multi-polar situation with a number of power centres.⁵⁵ O'Brien said:

The doctrine of peaceful co-existence was as much a political doctrine as a legal principle but it drew upon traditional stands in international law and reworked them to meet the anxieties of the Cold War and the nuclear age. In essence the doctrine requested respect for territorial integrity and sovereignty, non-aggression, and non-interference in internal affairs based on the principle of equality of status. (O'Brien 2001)⁵⁶

Peaceful co-existence is an important doctrine for Iraq;⁵⁷ to demand respect for territorial integrity and sovereignty, non-aggression, and non-interference in internal affairs based on the principle of equality of status.⁵⁸ In recent years this doctrine has not been observed in the Tigris and Euphrates region; in particular Turkey has occasionally used military aggression against the PKK militants within Iraqi territory.⁵⁹

In short, States are the primary subjects of international law, and thereby granted three profound rights other than the territorial sovereignty, they are: independence, legal

⁵⁴ Article 4 of the Draft reads 'Every State has the obligation to refrain from intervention in the internal or external affairs of any other State.'

⁵⁵ Shaw, *Supra*, footnote 3, at p.154.

⁵⁶ O'Brien, *Supra*, footnote 38, at p. 152.

⁵⁷ Article 4 of the Draft reads "Every State has the obligation to refrain from intervention in the internal or external affairs of any other State."

⁵⁸ O'Brien, *Supra*, footnote 38, at p. 152.

⁵⁹ John, *Supra*, footnote 39.

equality and peaceful co-existence. Additionally, political power could interfere with legal issues under international law, to affect the peaceful co-existence of States.

4.5 Obligations of States under international law

Since the right of one State presupposes the corresponding obligations of another State, three main obligations upon Iraq should be mentioned. They are: obligations to refrain from the threat or use of force against the territorial integrity or political independence of any other State, to settle disputes amicably, and to co-operate with other States.

4.5.1 State's Obligations to refrain

Article 2 (4) of the UN Charter stipulates the obligation of members to refrain from the threat or use of force. The Article's wording was criticised by Kelsen in the sense that it allows the use of force in the case of self-defence and there are other cases where, under the UN Charter, States are not forbidden to use force. Therefore, the obligation to which Article 2 (4) refers should be formulated to include individual or collective self-defence against armed attack.⁶⁰ Other than the UN Charter, Article 9 of DDROS 1949 provides a similar principle. It states that "Every State has the duty to refrain from resorting to war as an instrument of national policy and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order".⁶¹ The wordings of the above two articles show that threat or use of force are not only confined to armed attack, but rather it composes of a wider meaning to include abrogating a rule that restrains State's hegemony, especially in the latter article which specifically mentions political

⁶⁰ Kelsen, H., 1950. The Draft Declaration on Rights and Obligations of States. *The American Journal of International Law*, 44(2), at p. 271.

⁶¹ A similar principle is provided in the on Principles of International Law Concerning Friendly Relations and Co-operation. It states that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the UN. DPILCFRC, *Supra*, footnote 41, at p. 124.

independence. Nevertheless, in the case of self-defence the above principles may not function entirely, which could be a good excuse for Turkey to escape from this obligation. Further discussions on this issue will follow in Chapter Seven.

4.5.2 State's Obligation to peaceful disputes settlement

Generally States are at liberty to resolve their disputes over international watercourses by any peaceful means they deem fit.⁶² However, as far as international peace and security are concerned, international law in general imposes an obligation to prevent conflicts and settle disputes by peaceful means.⁶³ The obligation to settle disputes by peaceful means in Article 8 of DDROS 1949⁶⁴ is formulated by the UN Charter, by virtue of Article 2 (6), and has the character of general international law.⁶⁵ Like the doctrine of legal equality, this doctrine is also clear and no further research is required in this aspect.

4.5.3 State's Obligation to cooperate

In accordance with the UN Charter, States have the obligation to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations. This principle generally set out by the exchanging of data and information, on notification, consultation and negotiating

⁶² Rieu-Clarke, A., 2005. *International Law And Sustainable Development: Lessons from the Law of international Watercourses*. IWA Publishing, at p. 203.

⁶³ Article 2 paragraph (3) provides that all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. See Charter of the UN.

⁶⁴ The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered. States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute. DPILCFRC, *Supra*, footnote 41, at pp. 123-125.

⁶⁵ Kelsen, *Supra*, footnote 60, at pp. 259-276.

planned measures: it is part of ‘protection, preservation and management’ and no harmful conditions and emergency situations, as will be discussed in Chapter Six. The reasons for creating such an obligation are firstly, to maintain international peace and security, secondly, to promote international economic stability and progress, thirdly to promote the general welfare of nations, and fourthly, to uphold international cooperation free from discrimination based on such differences.⁶⁶ This obligation puts not only Iraq, but the neighbouring States of Turkey and Syria under the international obligation to cooperate in order to safeguard the above four approaches highlighted under the DPILCFRCS 1970.

In short, under international law, States are obligated to refrain, peacefully settle disputes and put cooperation into practice. In the case of fulfilling these obligations, they should be fulfilled fairly. Lukashuk argues that non-fulfilment or unfair fulfilment of obligations under international law entails international legal responsibility.⁶⁷ However, these three obligations are not the only ones; there are other important obligations that will be covered by other sections of this chapter, such as good faith and non harm principles.

Once the main rights and obligations of States under the international law have been identified, another question arises: where do those rights and obligations originate? Did they came into existence spontaneously upon the declaration of the UN in 1945, or did they come into existence as the process of the development of law? Also, how can those rights and obligations crystallise when two or more States need to settle disputes regarding their joint natural resources in light of international law? All these questions

⁶⁶ DPILCFRCS, *Supra*, footnote 41, at p. 124.

⁶⁷ Lukashuk, I. I., 1989. The principle Pacta Sunt Servanda and the Nature of Obligation Under International Law. *American Journal of International Law*, 83(3), at p. 513.

need to be answered through analytically examining the sources of international law, which is in the following section.

4.6 Sources of international law

Having considered the definition of ‘international law’ and the ‘subjects’ of international law, this section will identify the advantages international law provides to the Riparian States of the TERB, through examining the sources of international law. This section maintains that Article 38 of the statute of the International Court of Justice⁶⁸ (hereinafter ICJ) provides an authoritative statement on how to convey the best interest to the riparian States by virtue of international law.⁶⁹ Article 38 (1) of the Statute of ICJ provides a list of the sources of international law:

- i. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States.
- ii. International custom, as evidence of general practice accepted as law.
- iii. General Principles of Law recognized by civilized nations.
- iv. Judicial decision and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This chapter will consider two matters related to this Article; firstly, the determination of Article 38 in terms of content; and secondly, the determination of Article 38 in terms of application by the ICJ. As to the content of Article 38, it is important to illustrate how

⁶⁸ The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part. The main object of the Statute is to organize the composition and the functioning of the Court. *Statute of the International Court of Justice*, 18 April 1946, U.N., reprinted at <http://www.unhcr.org/refworld/docid/3deb4b9c0.html> [accessed 27 May 2010]. also the ICJ is established by the UN Charter as the principal judicial organ of the United Nations. Article 1 of ICJ.

⁶⁹ The ‘sources’ of international law presented in Article 38 of the ICJ will therefore be closely examined in order to determine, on one hand, their contents, and on the other, their application by the ICJ.

international law provides for enduring basin management at regional between the riparian States. Then the application of international law in the regional context of the TERB will be explained. The next section will focus on the determination of Article 38 in terms of content.

4.6.1 Determination of Article 38 in terms of content

This section will discuss all the four sources of international law provided by Article 38 in detail.

a. International Conventions and Treaties

This section presents analysis of how treaties and conventions may affect the rights and obligations of Iraq under international law. Within this section, five important questions will be discussed: What do “treaties or conventions” connote? What are the roles of treaties? At what stage is a State bound by a treaty? What is the significance of treaties when they are not entered into force yet?

International conventions or treaties will be only examined here in so far as they constitute a source of law. International conventions or treaties are often ranked as the *principal source of international law*.⁷⁰ This definition is in line with Shaw’s opinion that international law as international agreement.⁷¹ The word ‘convention’ literally means a large formal assembly of a group with common interests such as the States in the UN General Assembly. A ‘treaty’ literally means a formal agreement between two

⁷⁰ McNeill, J. H. Contemporary Practice of Public International Law. in Schaffer, Ellen G. & Snyder, Randall J.(Ed), *Contemporary Practice of Public International Law*. Schaffer, Oceana Publications, Inc., 1997, at pp. 4-5.

⁷¹ *Collins English Dictionary*. 1998. Glasgow, Harper Collins, at p. 347.

or more States.⁷² Treaty in legal terminology, according to the Article 2 of Vienna Convention of the Law of Treaties in 1969 (hereinafter VCLT 1969)⁷³ means “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and irrespective of its particular designation.” Finally, treaties can be bilateral or multilateral.⁷⁴

Treaties involve contractual obligations for the parties concerned, and consequently, create law for the purpose of ratification only for the parties agreeing to the provisions of the treaty duly signed. For example, Law No.14 Of 1990, Ratifying the Joint Minutes Concerning the Provisional Division of the Waters of the Euphrates River.⁷⁵ There are four important components to bring a treaty into life. Firstly, a treaty is a binding instrument, which means the contracting parties intend to create legal rights and obligations. Secondly, the State parties with treaty making power shall conclude the instrument. Thirdly, treaties must be governed by international law, i.e. it shall be clearly stated in the treaty signed that international law is the law that shall govern the treaty in terms of implementation of its provisions. Finally, a treaty must be made in writing.

⁷² Ibid, at p. 1627. also Sein, M. A., 2000. *Essential Cases and Materials on International Law, A Malaysian Perspective*. Selangor, Law Centre, IIUM, at p. 5. also Articles 26 and 27 of Vienna Convention on the law of treaty. Convention on the Law of Treaties, May 23, 1969 (entered into force Jan. 1980), reprinted in 8 I.L.M. 679 (1969)

⁷³ Prior to 1969, the law of treaties consisted of customary rules of international law. Many of the rules relating to treaties between States were then codified in the Vienna Convention on the Law of Treaties 1969. Hiller, *Supra*, footnote 2, at p. 103. Yet, the rules of customary law still have an important role in international law and it is important to decide the extent to which UNWC 1997 codifies the existing customary law. Charney, J. I., 1993. Universal International Law. *The American Journal of International Law* 87(4), at p. 534,

⁷⁴ It is suggested that ‘convention’ and ‘treaty’ have similar meanings, and therefore, for the remainder of this chapter, the word ‘treaty’ will for the purpose of this thesis be used as a general term for both ‘treaty’ and ‘convention’, and the word ‘convention’ will be used to refer specifically to multi lateral treaties.

⁷⁵ This Thesis, *infra*, Annex III.

Treaties play several significant roles. Firstly, a treaty provides the most concrete evidence of the existence of rights and obligations between States.⁷⁶ It may also provide evidence of customary international law⁷⁷ and provisions formulated in a treaty can, in certain circumstances, be binding even on non-parties to the treaty, especially when the provisions articulate what is already customary international law.⁷⁸ Secondly, a treaty is binding on the parties upon signing.⁷⁹ Before a State is prepared to ratify a treaty thereby binding itself to that treaty, it will ensure that nothing is done which would defeat the object and purpose of the treaty.⁸⁰

It is important to consider at what stage States are bound by a treaty. First and foremost, treaties mean relinquishment of sovereignty.⁸¹ States must voluntarily accept obligations provided in the treaty for it to be valid, although in certain circumstances some political duress may be exercised. The said acceptance is an implicit recognition of certain limitations to sovereignty; that the protection of State's own interests cannot ignore other States' rights. However, upon signing a treaty, States not only accept obligations, but also acquire rights. As a result, State's sovereignty settles in equilibrium so that State's rights and obligations are both protected. Hence, a different kind of sovereignty

⁷⁶ Rieu-Clarke, *Supra*, footnote 62, at p. 21.

⁷⁷ Treaty may in particular instance, codify pre-existing rules of customary law. In that case, the treaty will be evidenced of what that pre-existing rule was. Similarly, a treaty may be the source of a new customary rule, in which case it will provide evidence of this new rule in just the same way. Gaebler, R. F., *Conducting Research in Customary International Law*. in Schaffer, Ellen G. & Snyder, Randall J. (Ed), *Contemporary Practice of Public International Law*. Schaffer, Oceana Publications, Inc., 1997, at p. 83.

⁷⁸ Higgins, R., 1994. *Problems and Process, International Law and How We Use It*. Oxford, Clarendon Press, at pp. 27-28.

⁷⁹ Article 32 of VCLT 1969 provides that every treaty in force is binding upon the parties to it and must be performed in good faith. VCLT, *Supra*, footnote 72.

⁸⁰ However, when a treaty is not signed, yet a State may choose accession or adhesion to the treaty. Accession, means that a State is to join the whole treaty, whereas adhesion only when a State accepts part of that treaty. Despite the consent of the existing State parties to the treaty is the only way for a State to accede or adhere, such as the persistent Turkish endeavour to accede to the European Union. Hiller, *Supra*, footnote 2, at pp.132-133. Ratification takes place when there is approval by the head of State or government of the signature to the treaty. Anderson, C. P., 1919. The Ratification of Treaties with Reservations. *The American Journal of International Law*, 13(3), at pp. 526-530. It is also established that ratification is the State's acceptance to be bound by the treaty. *also* Article 2 VCLT, *Supra*, footnote 72.

⁸¹ Karnad, *Supra*, footnote 23, at p. 421.

will be established that may be called ‘soft sovereignty’.⁸² This kind of flexibility makes the three principles of independence, legal equality and peaceful co-existence⁸³ work in best practice.

Even though a State may have deposited its ratification of a treaty, it may still not be a party to it until it enters into force.⁸⁴ The treaty may not come into force until certain other ratifications are likewise deposited. Therefore, such a ratifying State, like Iraq or Syria, are not bound by UNWC 1997 and they could probably even withdraw or vary their ratification prior to UNWC 1997 entering into force.⁸⁵ However, the significance of this Convention in particular is that it is considered by the ICJ as a reflection of customary international law.⁸⁶ Further details in this regard are provided in Chapter Five.

b. International Custom

In the international law system, there is no legislature, i.e. no formal method of making and enforcing laws, a consistent and uniform usage on one hand, and States consent and regard as obligatory on the other, plays an important role in regulating conduct between States.⁸⁷ Thus, international custom can create new norms or change or abolish existing norms.⁸⁸ Article 38 (b) of the ICJ Statute provides that international custom, as evidence

⁸² The assumption and exercise of international legal obligations constitute a realisation of sovereignty, and a State’s capacity to exercise its sovereignty in international relations is enhanced. Lukashuk, *Supra*, footnote 67, at p. 514.,

⁸³ Subjects of international law, *Supra*, heading 4.3.

⁸⁴ *Summary record of the 9th Meeting*, *Supra*, footnote 12, *Supra*, footnote 12.

⁸⁵ *Ibid.*, at p. 707.

⁸⁶ Reports of judgments, advisory opinions and orders in the (hungaryislovakia). Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovak), Sep. 25, 1997, 37 I.L.M. 162 (1998), at pp. 53-55. Available at <http://www.icj-cij.org/docket/files/92/7375.pdf>, accessed May 2010. also McCaffrey, Steven C., 2001. *The Law Of International Watercourses: Non-Navigational Uses*. Oxford University Press, at p.185.

⁸⁷ Rieu-Clarke, *Supra*, footnote 62, at p. 23. also McNeill, *Supra*, footnote 70, at p.5.

⁸⁸ It is proven by practice of States and of international tribunals and courts, and admitted overwhelmingly by writers that international custom is a procedure for the creation of norms of general international law. It is international law which lays down the conditions under which the procedure of

of general practice accepted as law, is to be considered as the second source of international law.⁸⁹ However, Thorpe states that international customary law is rarely found in an explicit written form,⁹⁰ although some rules have been codified by international conventions in recent years.⁹¹

Normally, for States decisions of national and international courts, national legislation, diplomatic correspondence, the opinion of national legal advisors and the practice of international organisations denote some classical⁹² and general forms of evidence of customary international law.⁹³ For Falk, because of various interests pursued by States, customary international law will be formed as a result of the process of their assertion and counter-assertion of claims.⁹⁴ Charney went further by deeming political decisions necessary steps to form a rule of law, and that the pressure on the objecting State may be viewed as part of that process.⁹⁵ Both States' assertions and political decisions have

custom creates valid norms of general international law. These conditions are two: usage or today called "State practice" and "*opinio juris*". Shaw, *Supra*, footnote 3, at p. 665.

⁸⁹ Article 38 (b), of the statute of the ICJ. *Statute of International Court of Justice*. ICJ Website. Available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>, accessed 10 May 2010.

⁹⁰ Because in terms of progress, traditional customary law formation very slowly developed since both the scope of international law and the numbers of States were limited.

⁹¹ Thorpe, S. A guide to International Legal Bibliography. in Schaffer, Ellen G. & Snyder, Randall J., (Ed), *Contemporary Practice of Public International Law*. Schaffer, Oceana Publications, Inc., 1997, at p. 39. However, in more modern times the number of States and their diversities has dramatically increased, and both transportation and communication technology are increasing advanced States, and cooperation at the global scale is more in demand. Hence, the progress of customary international law tends to be faster since it is developed from multilateral treaties and declarations by international forums like the UNGA, which can declare, distil and generate new customs to organise the interests of the international community.

⁹² Ibid.

⁹³ Roberts, A. E., 2001. Traditional and Modern Approaches to Customary International Law, A Recodification. *The American Journal Of International Law*, 95(4), at p. 757.

⁹⁴ Falk, R. A., 1966. Custom in Present International Law. *The American Journal of International Law*, 60(1), at p. 134.

⁹⁵ Charney, *Supra*, footnote 73, at p.539.

become an increasingly significant source of modern international law in important areas such as human rights obligations.⁹⁶

Customary international law changes in content depending upon new circumstances.⁹⁷ Guzman stated that it seems eminently plausible that States interacting with one another over time would develop norms to guide behaviour, and that some those norms would come to be regarded as ‘law.’⁹⁸ Nowadays, boundaries are limited by law and States have their own agenda for development, and disputes arise between them when they share water resources. The establishment of new regulations to manage the shared waters peacefully between co-riparian States at global scale thus should have an important value.

International custom is comprised of two elements; they are State practice and *opinio juris*.⁹⁹

State practice, can be described as any act, articulation, or other behaviour of a State which discloses the State’s conscious attitude or recognition concerning a customary rule.¹⁰⁰ Caponera conveys the view that the origin of every international rule must be traceable.¹⁰¹ However, Fidler argued that it is no longer possible to analyse State practice properly since the number of States has increased there is too much of it.

⁹⁶ In considering the differences between the traditional and modern custom traditional customary law is formed and identified through an inductive process in which a general custom is derived from specific instances of State practice. Roberts, *Supra*, footnote 93, at p. 757.

⁹⁷ D’Amato, A., 1978. Trashing Customary International Law. *The American Journal of International Law* 81(1), at pp. 101-105.

⁹⁸ Guzman, A. T., 2005. Saving Customary International Law. *American Law & Economics Association Annual Meetings, Boalt Hall*. 2005. Berkeley, University of California, at p. 70.

⁹⁹ Akehurst, M., 1974. The Concept of Custom in International Law. *International Customary Law and Codifications: An Examination of the Continuing Role of Custom in the Present Period of Codification of international Law, International Affairs. Royal Institute of International Affairs*, 50(1), at p. 114-116.

¹⁰⁰ Hiller, *Supra*, footnote 2, at p.71.

¹⁰¹ Caponera, Dante A., 2003. *National and International Water Law and Administration*. Netherlands, Kluwer Law International., at p.176.

Besides which, the selective approach could be misleading because it claims to be finding general and uniform State practice accompanied by *opinio juris* that creates a legal obligation for all States on minimal evidence.¹⁰² Fidler's argument is deliberated further by D'amato, who believes that international law is largely concerned with conflicting international claims as a matter of daily practice, which may articulate a legal norm but cannot constitute the material component of custom.¹⁰³ However, when there is 'practice', whether positive acts or omissions, in times of peace or war, it must have been continued and repeated without interruption,¹⁰⁴ but not necessarily be 'ancient'.¹⁰⁵ Moreover, general practice under international law requires sufficient participation by the overwhelming majority of States, especially on the part of States whose interests are likely to be most affected.¹⁰⁶ However, the degree of such participation does not have to be completely uniform¹⁰⁷ or unanimous.¹⁰⁸

With regards to the term *opinio juris*, it means a belief or opinion of law or of necessity;¹⁰⁹ it is also known as the 'subjective element' of customary international law and is one of the two requirements for the existence of a rule of customary international law.¹¹⁰ A wealth of State practice will usually carry a presumption that *opinio juris* exists, unless a State can demonstrate the absence of *opinio juris* in the activities being

¹⁰² Fidler, D. F. Dinosaur, Dynamo, or Dangerous? Customary International Law in the Contemporary international System. in Schaffer, Ellen G. & Snyder, Randall J.(Ed), *Contemporary Practice of Public International Law*. Schaffer, Oceana Publications, Inc., 1997, at p. 70.

¹⁰³ A. D'Amato., 1971. *The Concept of Custom in International Law*. London, Cornell University Press Ltd., at p. 88.

¹⁰⁴ Kunz, J. L., 1953. The Nature of Customary International Law. *The American Journal of International Law*, 47(4), at p. 666.

¹⁰⁵ It is argued that this type of situation falls within the domain of international relations. However, international law contains no rules as to how many times or for how long a time this practice must have been repeated. Ibid. also Hiller, *Supra*, footnote 2, at p.74.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Kunz, *Supra*, footnote 104, at pp. 666-667.

¹⁰⁹ Hiller, *Supra*, footnote 2, at p.80.

¹¹⁰ The standard formulation of *opinio juris* is that a practice must be "accepted as law." The precise contours of the *opinio juris* requirement are somewhat uncertain, but most agree that some version of it is required. Guzman, *Supra*, footnote 98, at p. 29.

relied upon by the other States.¹¹¹ Thus, *opinio juris* refers to the conviction of States that the consistent practice is supported by a legal obligation,¹¹² which is the factor that turns practice into a custom and renders such a custom part of the rules of international law.¹¹³

Considering how closely State practice and *opinio juris* should be interrelated in order to establish customary international law, there are three different views. The first argues that both State practice and *opinio juris* must be equal in order to constitute international custom.¹¹⁴ The second view argues that State practice and *opinio juris* are never objectively evident.¹¹⁵ According to this view, it is difficult to draw a distinction between the two components, especially when there are factors other than State practice and *opinio juris* that often play a central role in shaping customary international law. Among those factors are for example; multilateral forums; views expressed by States in UNGA,¹¹⁶ Security Council (hereinafter UNSC), Regional Organizations; and standing and ad hoc multilateral diplomatic conferences.¹¹⁷ Moreover, major developments in international law often begin with or receive substantial support from, proposals, reports, treaties or protocols debated in such forums.¹¹⁸ The third view argues that State

¹¹¹ Hiller, *Supra*, footnote 2, at p.45.

¹¹² Kunz, *Supra*, footnote 104, at p. 664.

¹¹³ Shaw, M. N., 2003. *International Law*. (5th Ed). Cambridge University Press, at p. 80.

¹¹⁴ The ICJ has referred to *opinio juris* as being on an equal footing with State practice, who quoted from the Legality of Nuclear Weapons Advisory Opinion (GA), note 8. Hiller, *Supra*, footnote 2, at p.46.

¹¹⁵ Charney submitted that the proof of not only *opinio juris* but even State practice has never been objectively evident, as it has always depended on subjective interpretations of the facts and the motivations of State officials. Charney, *Supra*, footnote 73, at p.545

¹¹⁶ It is true that the General Assembly resolutions are not binding in and of themselves, however, Arzt believes that while most GA resolutions are mere recommendations made pursuant to Article 10 of the UN Charter, in certain circumstances they can be considered persuasive restatements of existing law or can, if repeated over time, achieve the effect of such binding force through the acceleration of the custom-generating process or through the doctrine of estoppel. Donna E. Arzt, "The Right to Compensation: Basic Principles Under International Law, Compensation as Part of a Comprehensive Solution to the Palestinian Refugee Problem." *The International Development Research Centre's Workshop On Compensation For Palestinian Refugees*. Ottawa. Available at http://www.arts.mcgill.ca/mepp/new_prn/research/papers/artz4.htm, accessed 23 April 2009.

¹¹⁷ Hiller, *Supra*, footnote 2, at p.544.

¹¹⁸ *Ibid*.

practice is different from *opinio juris* especially in the case of highly consistent State practice which can establish a customary rule without recourse to *opinio juris*. Only when the frequency and consistency of State practice declines, a stronger attendance to *opinio juris* is crucial.¹¹⁹ The third view, in fact, considers the trade-off¹²⁰ between State practice and *opinio juris* not to be of equal value, but rather it depends on the importance of the activity in question and the reasonableness of rule involved.¹²¹ Furthermore, Roberts argues that treaties and declarations can represent *opinio juris* because they are statements about the legality of action, rather than examples of State practice.¹²² In fact all of the above three views are relevant since none can subsist without the other one, and will be referred in the subsequent chapters.

c. General principles of law

General principles of law are those principles commonly recognised by civilised nations¹²³ as so fundamental as to become a part of international law.¹²⁴ Among such principles regarded as established international law¹²⁵ are the binding force of peremptory norms of *jus cogens*,¹²⁶ *estoppel*,¹²⁷ *equity*¹²⁸ and *pacta sunt servanda* and

¹¹⁹ Roberts, *Supra*, footnote 93, at p. 760.

¹²⁰ Trade-off means exchange of one thing in return for another, especially relinquishment of one benefit or advantage for another regarded as more desirable. Litte, William, Fowler, H. W. & Coulson, Jessie., 1973. *The Shorter Oxford English Dictionary: On Historical Principles*. (3rd Ed). Oxford, The Clarendon Press, at p. 1683.

¹²¹ Hiller, *Supra*, footnote 2, at p.46.

¹²² Roberts, *Supra*, footnote 93, at p. 758.

¹²³ Statute of ICJ, Article 38 (1) (c).

¹²⁴ McNeill, *Supra*, footnote 70, at p. 5.

¹²⁵ Charney, *Supra*, footnote 73, at p.p.535.

¹²⁶ The principle *jus cogens* is a preemptory norm of international law accepted and recognized by the international community and a norm from which no derogation is permitted. The principle *Jus cogens* rejects State consent as the foundation of its existence. Thus, it trumps persistent objection in relation to an international legal custom. Peoples, L., 2005. *Research Guide to Customs, General Principles & the Teachings of Highly Qualified Publicists, Research and Instructional Services*. Oklahoma, Oklahoma City University Law Library, at pp.9-13. Available at http://www.okcu.edu/law/lib/pdfs/guide_custom.pdf, accessed 16 June 2007.

¹²⁷ Estoppel is a rule of evidence (and not a cause of action) preventing a person from denying the truth of a statement a person has made previously. Litte, William, Fowler, H. W. & Coulson, Jessie., *Supra*, footnote 120, at p. 683. Estoppel is a principle of substantive law and not just a technical rule of evidence, according to which a State party to an international litigation is bound by its previous acts or attitude

good faith.¹²⁹ In theory, the evidence for these principles is to be found in the domestic law of those States that represent civilised nations. This may be seen as a directive to the Court to fill any loop-hole in the law and prevent any shortcomings by reference to the general principles. Although it was asserted that Article 38(1) (c) forms an integral part of general international law,¹³⁰ nowadays, the increased intensity of treaty-making and institutional relations between States have lessened the significance of general principles.¹³¹

As to the principle *pacta sunt servanda*, it is translated from the Latin as ‘promises must be kept’, which is an expression signifying that the agreements and stipulations of the parties to a contract must be observed.¹³² Hiller acknowledged that *pacta sunt servanda* constitutes a higher rule of customary law as it is difficult to imagine how a system of international law could operate without it. It lays down the rule of fairness and reciprocity, and makes the use of deception inadmissible.¹³³ One who has violated a rule has no right to demand its fulfilment by other parties and may not claim the benefits arising from the violated rule. The aggrieved State may withdraw from its reciprocal right and obligation with the violating State. Moreover, if a State considers an act to be inconsistent with a certain rule, similar behaviour by another subject shall be regarded

when they are in contradiction with its claims in the litigation. It is stated further that these terms are not to be understood in quite the same sense as they are in municipal law. It is submitted that this principle can operate with decisive effect in international litigation. A. E. Evans, “International Arbitration,” *The American Journal of International Law* 61, nos. 4 (October 1967): 1071-1075. also Hiller, *Supra*, footnote 2, at p.527.

¹²⁸ It is suggested that the application of equity as a general principle should not be confused with Article 38 (2) which States that if both parties to a dispute agree, the court can apply equity in precedence to all other legal rules. Ibid., p. 93. White, Justice Margaret, *Equity – a General Principle of Law Recognised by Civilised Nations?* at pp. 109, 113-116. Available at <http://www.law.qut.edu.au/ljj/editions/v4n1/pdf/White.pdf>, accessed 10 May 2009.

¹²⁹ It is not clear whether general principles refer to those of the international legal system or those of municipal system. Hiller, *Supra*, footnote 2, at p. 527.

¹³⁰ Verdross, *Supra*, footnote 4, at p.243.

¹³¹ Hiller, *Supra*, footnote 2, at p.45.

¹³² *Pacta Sunt Servanda*. 2005. *West's Encyclopedia of American Law*. Available at <http://www.encyclopedia.com>, accessed 23 December 2009.

¹³³ Ibid.

as running counter to that rule.¹³⁴ Finally, this rule of fairness and reciprocity is, in fact, one of the elements of successful treaty implementation, especially particular treaty, because it draws equal rights and obligations for parties to the treaty.

In the legal sphere, States are legally bound under this principle to implement what the law prescribes even if the government of the State changes or if it is not currently disposed to fulfil the requirements of the treaty.¹³⁵ Thus, States should to identify firstly their actual circumstances and interests within the scope of a particular treaty.

d. Judicial decisions and juristic writings

Article 38(1) (d), which provides subsidiary means for the determination of rules of law. The teachings of the most highly qualified publicists of various nations,¹³⁶ which are sourced from treaties and legal periodicals may be used as a subsidiary means of establishing the existence of international legal rules.¹³⁷ It is, however, disputable as to whose work is regarded as the most qualified, but it is posited that the principle of customary international law will ultimately decide such disputes.¹³⁸ In terms of influence, it is difficult to tell what influence these teachings have on the development of the law.

¹³⁴ Ibid.

¹³⁵ Charney, *Supra*, footnote 73, at p.p.534.

¹³⁶ Hiller, *Supra*, footnote 2, at p.94.

¹³⁷ These 'teachings' are generally defined as scholarly writing of acknowledged authorities on international law. The word 'Teachings' also refers to work produced by groups of scholars working collectively in organisations like the International Law Commission. It is submitted that beyond the accepted classics there will often be dispute over who is a highly qualified publicist. Peoples, *Supra*, footnote 126, at p. 11.

¹³⁸ To determine if particular international tribunal considers an individual to be highly qualified publicist a useful strategy may involving searching previous decisions of that tribunal for any references to the work of the individual in question. Ibid.

Other than the four elements recognised by Article 38 (1), there are other factors for the ICJ to consider as the source of contemporary international law.¹³⁹ Among those factors to be considered by the ICJ are, for example, resolutions made by the UNGA as indicative of customary international law. The ICJ may also consider the draft articles on international law published by the International Law Commission as authoritative statements on international law, although those kinds of materials do not have a binding nature.¹⁴⁰

4.6.2 Determination of Article 38 in terms of application

Following on from the discussion of the contents of Art.38 of the statute of ICJ, this section will discuss the method of application of the said resources by the court. Brownlie asserted that the said four sources of international law are expressed in terms of the function of the ICJ, and they represent the previous practice of arbitral tribunals.¹⁴¹ Accordingly, it seems clear that Art.38 does not provide a particular and complete list of the sources of international law, and it is rather a direction to the court as to the various materials it shall consider when deciding disputes submitted to it. Whatever the case may be, the article is arguably to be regarded as a complete statement of the sources of international law even though the article does not specifically refer to ‘sources’.¹⁴²

Apart from the single reference to “subsidiary means” stated in Article38 (d), there is no indication in the said Article of the priority or hierarchy of the sources of international

¹³⁹The use of word “source” is argued to be a highly ambiguous expression which leads to confusion, and therefore, should be dropped as a legal term. Kunz, *Supra*, footnote 104, at p. 663.

¹⁴⁰ Ibid.

¹⁴¹ Brownlie, I., 2003. *Principles of Public International Law*. 6th Ed. Oxford University Press. at p. 194.

¹⁴² Sahl, Silke., 2007. Researching Customary International Law, State Practice and the Pronouncements of States regarding International Law. Available at http://www.nyulawglobal.org/globalex/Customary_International_Law.htm#_ednref7, accessed 12 March 2009.

law, because it was intended that the court shall consider each ‘source’ simultaneously, given that international law must be regarded as an integrated system of legal rules and not merely an amalgam of various unrelated principles. So, existing relevant treaty provisions agreed upon by State parties shall be applied by the court. In the event of no prevailing provision in the treaty, a custom, which is accepted as legally binding, shall be applied owing to the fact that the law made by treaty and customary law have equal authorities as international law, and usually they are complementary.

If neither a treaty provision nor a custom can be identified by the court, then, the ‘general principles of law’ may be invoked, as most modern writers accept that the general principles of law are of secondary importance to treaties and custom.¹⁴³ Therefore, it shall only be utilised in the event the said two primary sources are unable to provide a solution. It is important to comment on the doctrine of equity or fairness, which is deemed one of the general principles of law. Shaw stated that the ICJ declared that equity, as a legal concept, is a direct emanation of the idea of justice. However, principles of equity cannot overturn accepted legal rules.¹⁴⁴

Finally, under Art.38 (d), judicial decisions and writing may be utilised only as subsidiary means of determining the rules of international law, because there is no binding precedent under international law. The decision of the ICJ has no force except between the parties before the court and in respect of that particular case. However, the court may refer to previous judgments and it can also refer to national judgments when they are considering matters of international law.

¹⁴³ Louis, Clemens. General Principles of European Law. *Bundesweite Kanzlei für Strafrecht*. Available at http://www.rechtsanwalt-louis.de/general_principles_of_european_law.htm, accessed 14 May 2009.

¹⁴⁴ Shaw, *Supra*, footnote 3, at pp. 100-101.

General Assembly Resolutions are not legally binding. Resolutions which attempt to declare the international legal position on certain points either of existing law or new law shall be judged by the normal rules of customary international norm development.

It is recommended that the ICJ approach to the four elements in Article 38 is used by the riparian States and applied to the TERB. The most important suggestion to the riparian States of TERB is that when they meet at the negotiation table for a binding treaty, they visit all the four elements under Article 38. When they have reviewed the Article thoroughly, a strong dynamic and good treaty can be achieved. It is not necessary for the riparian States to insist in applying a particular provision while undermining the others. Instead, it is necessary to consider the entire Article 38 in a comprehensive manner. For example, the riparian States can refer to the signed treaties and other instruments between them and endeavour to amend them through revisiting the other three elements of Article 38 which are international custom, general principles of law and judicial decisions and juristic writings. Only then will the efficiency of international law crystallise. When other issue arise later, this method can be used to enforce the rules of international law between the riparian States. This issue will be discussed in the following subsection.

4.7 Enforcement of international law in relation to the TERB

Using Shaw's definition of international law, that is, international agreements that create binding rules upon the signatories, the subject of enforcement is divided into two types; they are enforcement of international law on the signatories of international agreements; and enforcement of international law on the non-signatories of international agreements. However, before that a reference to the meaning of 'enforcement', how international law can be enforced, and who are enforcers?

According to the doctrine of international law, a State has the right, in absence of agreements to the contrary, peacefully¹⁴⁵ or by legal use of force, including military action¹⁴⁶ to secure its international legal rights, judging the circumstances for itself.¹⁴⁷ If that is so, the term ‘enforcement’ in a strictly logical sense is a crucial problem because every State has a different interpretation of what legal rights mean. Reisman portrayed ‘enforcement’ as a transformation, by community means, of an authoritative pronouncement into a controlling reality, which can be direct or indirect.¹⁴⁸ Likewise, the enforcement of international law originates from the pressure that States exert upon one another to behave consistently and to honour their obligations.¹⁴⁹ One should admit the fact that once States comply with their rights and obligations towards another State voluntarily, they are implementing international law. So, implementation of international law is different from enforcement. Avoiding a detailed comparison between implementation and “enforcement” of international law, suffice it to say,

¹⁴⁵ As with any system of national law, many violations of international law obligations occur. However, unlike in national law, at the international level solutions are almost always sought through diplomacy and influenced by the consequences upon an offending State's reputation. Though violations may be common in fact, States try to avoid the appearance of having disregarded international obligations. There are two ways of enforcement by peaceful means; firstly through alternative dispute resolution (hereinafter the ADR), and secondly, by recourse to the ICJ. Decisions made through ADR can be from mediation, reconciliation and arbitration, and may be binding or non-binding in nature depending on the nature of the agreement between the States in dispute. Alternatively, upon mutual consent, States may submit their disputes to the ICJ if the ADR process failed to bring the parties to the final solution. The judgments given by the ICJ in these cases are binding, although it possesses no means to enforce its rulings. The duty of the court is to give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the UN Charter to make such a request. Some of the advisory cases brought before the Court have been controversial with respect to the Court's competence and jurisdiction. Charney, *Supra*, footnote 73, at p.. 545-546.

¹⁴⁶ *Uniting for Peace Resolution*, Nov. 3, 1950, G.A. Resolution 377, A-RES-377(V), *reprinted at* <http://untreaty.un.org/cod/avl/ha/ufp/ufp.html> [accessed 27 May 2010]. *also* Akehurst, M., 1991. *A Modern Introduction to International Law*. Kent, Harper Collins Academic, p. 7. *also* Joyner, C. C., 1985. Public International Law. *The American Journal of International Law*, 79(1), at pp. 183-185. *also* Chapter VII of the UN Charter.

¹⁴⁷ Potter, P. B., 1969. Bases and Effectiveness of International Law. *The American Journal of International Law*, 63(2), at p. 270-272.

¹⁴⁸ Reisman, W. M., 1969. The Enforcement of International Judgments. *The American Journal of International Law*, 63(1), at p. 6.

¹⁴⁹ Shaw, *Supra*, footnote 3, at p. 252.

recourse to enforcement is only necessary if implementation has not occurred.¹⁵⁰ The establishment of compulsory international adjudication has being characterised as imperative¹⁵¹ albeit as a long-range goal.¹⁵² Nevertheless, international enforcement can be an instrument for preserving the current minimum order and for laying the groundwork for future institutionalisation of the world community.¹⁵³

Potential enforcers range from international organisations, functional agencies, regional organisations or nation-States acting jointly or severally, to non-governmental organisations, individuals and elites.¹⁵⁴ Not all of these entities have direct control over the assets of the target State. Also powerful States frequently find it easier if it is directed by an authoritative organisation. Similarly, the UN Charter recognises two methods of enforcement; enforcement by peaceful means and enforcement by recourse to use of force. The former is allowed and preferred based on Article 2 (3) of the UN Charter,¹⁵⁵ whereas the latter, without prejudice to Chapter VII of the Charter, is not allowed.¹⁵⁶

With regards to the first type of enforcement of international law was on the signatories of international agreements, if there was a reliable binding treaty between the riparian States of the TERB, it would be sufficient to only discuss the first type of enforcement. Nevertheless, it is considered that the existing treaties between the riparian States are not comprehensive enough to be regarded as reliable, and Turkey has rejected the

¹⁵⁰ Draper, G., 1983-84. Enforcement of International Law: A way to World Peace, A Documentary History and Analysis. *International Affairs*, 60(1), at p. 136-137.

¹⁵¹ Potter, *Supra*, footnote 147, at p. 272.

¹⁵² Reisman, *Supra*, footnote 148, at p. 8.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*, at pp. 9-10.

¹⁵⁵ Article 2 (3) provides that: All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

¹⁵⁶ Article 2 (4) states: All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

UNWC 1997. Therefore, the second type of the enforcement will be discussed as well. Before going into detail with regards to the above two stages, it is imperative to differentiate, for the purpose of this subject, between international agreements which are of general nature and international agreements which are of particular nature. The justification is to distinguish between international agreements in terms of implementation.

Based on significant study of the nature of different international agreements, it can be argued that agreements such as the 1997 UN Convention, concluded by a large number of States, are more general than those entered into by a small number of States for the purpose of regulating their relationship with respect to particular and definite matters. This is due to the fact that this type of agreements relies merely on good will that makes the agreements difficult to be implemented. Therefore, it can be considered that such agreements to be of a general nature. On the other hand, the particular agreements made and concluded between States, for example, the Treaty of Friendship and Neighbourly Relations between Iraq and Turkey in 1946 (hereinafter the TFNRIT 1946) along with its protocols¹⁵⁷ are, found to be, more focused than the general agreements due to the fact of containing particular, clear, and precise provisions, which make the treaties more easily implemented. Therefore, one could consider such agreements as of particular nature.

As far as enforcement of international law on the signatories of international agreements is concerned, the basic rule concluded is that international law represented in international agreements whether general or particular, as indicated above, will become legally binding and enforceable only on those States that formally accept the agreement

¹⁵⁷ This Thesis, *infra*, Annex I.

by duly signing them. In short, if international agreements of a general nature enter into force they will be legally binding and enforceable upon the ratifying States. This fact leads to an important question as to whether the UNWC 1997 alone can be successful in regulating the relationship between the riparian States of the TERB, and accordingly avoiding any rise of disputes between them. Before considering this question, it is important to examine the main provisions of the UNWC 1997. All these will be covered in Chapter Five.

The second type of enforcement of international law is on the non-signatories of the international agreements. The general rule is that international law represented in international agreements whether general or particular as previously mentioned are deemed to be soft law, i.e. not legally binding and accordingly not enforceable, unless they have been duly accepted by the parties to them as stated earlier.

However, owing to the fact that international general agreements such as 1997 UN Convention offer through their provisions general guidelines to the riparian States, as stated earlier, in which these agreements, even without the required acceptance to them by the concerned parties, are being increasingly invoked in international forums. On the other hand, regarding the particular agreements made and concluded between the riparian States, they in fact do not amount to international agreements unless signed by the riparian States, i.e. they must be, initially, formally agreed upon by them in order to be of international nature.

Finally, a significant question arises here with respect to the function or importance of international law in general. International law represented by international agreements along with customary law and other sources, cannot be legally and technically binding

upon the States and accordingly enforceable, unless it has been formally accepted to be practiced by them, and even then there are problems respecting implementation. Hence, the core matter to advocate is how States can take advantage of the benefits of international law? This question is in fact directly related to the main hypothesis of the thesis, which proposes that international law is the principal instrument to support Iraq to achieve its legal entitlements to equitable and reasonable use of its transboundary waters.¹⁵⁸

The most important feature of international law is that it is the only law that can be agreed upon between the States. For instance, in case the riparian States wish to make and conclude any particular agreement between them to manage the TERB, each State would like its national law to be the governing law of such an agreement. This is in fact normal, but for the purpose of avoiding any dispute with this regard, i.e. choosing the governing law of the agreement to be made, international law is the best and only law to be the governing law to the said agreement to be made. This is because of the nature of international law can take into account the interests of all States without discrimination. Therefore, international law will satisfy all the riparian States and, hence, should be used to make and conclude any agreement between them.

In addition, international general agreements, although not legally binding and enforceable unless accepted by the States, nevertheless offer general agreements for the riparian States and a legal framework as a basis for settling any disputes or conflicts between them. In other words, the international law helps and assists the States in an indirect form to resolve their disputes and arranging relationships in general. Rieu-Clarke argued that although international law is not perfect, it can most precisely

¹⁵⁸ Chapter One, *Supra*, heading 1.3.

communicate expectations and produce confidence between States.¹⁵⁹ Such confidence comes from the notion of legal norms: the ability to present rights and obligations, and the consequences resulting from a breach of those norms, otherwise known as State responsibility.¹⁶⁰ Thus, failure to comply with a rule of international law gives rise to international and legal responsibility,¹⁶¹ although the existence of a State presupposes sovereign control and jurisdiction over a territory. Hence, States can get advantages from the function of international law through the establishment of a framework in a particular treaty for identifying States' rights and obligations within the international legal system.

4.7.1 Particular Agreements made and concluded between the riparian States

It has been argued that States should not solely rely on the international legal rules represented in international general agreements along with customary law and other sources of international law. Such rules do not have effective enforcement mechanisms due to the fact that they offer only general agreements for water allocation. However, There is a need to make particular agreements, whether treaties, conventions, protocols, or joint minutes and the like, between the States on the basis of international legal rules and principles, for the purpose of settling different particular issues between them. This is the main door to get legally binding and efficient rules established between the riparian States. Those rules should be well drafted within a well-formulated structure of a treaty that is accepted and signed between the riparian States. Analysing those agreements made between the three riparian States will be undertaken in Chapter Six so that it would institute good bases for treaty structure formation, which will be addressed in Chapter Seven.

¹⁵⁹ Rieu-Clarke, *Supra*, footnote 62, at p. 16.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

4.8 Conclusion

The main focus of this was to examine the significance of international law pertaining to inter-State relations and the application of international law. International law is a body of rules, which are legally binding on States in their intercourse with each other, primarily through international agreements binding upon the signatories. As the primary subject of international law, States are privileged with independence, legal equality and peaceful co-existence rights. Besides those rights, States have the obligations to refrain, peaceful dispute settlement, and the obligation to cooperate are corresponding obligations of States.

As far as sovereignty is concerned, it was argued that since Iraq is a Member State of the United Nations, it should enjoy sovereignty over its territorial jurisdictions, like any other sovereign State bound by the UN Charter, despite the 2003 US invasion. The UNSC Resolution 1483 reinforced Iraq's sovereignty and territorial integrity despite the current occupation, chaos and disorder conditions.

In discussing Iraq's rights, firstly it was argued that the political independence of Iraq in terms of its transboundary water is believed to be manipulated by Turkish policymakers due to the lack of transparent relationship between the two riparian States. Secondly, the equality of legal rights and obligations of States was discussed, with reference to the UNGA doctrine of one State, one vote, irrespective of the realities of power. Iraq is enjoying this right by virtue of the UN Charter. Thirdly, Iraq's right to peaceful coexistence is not established due to Turkish interference with the daily activities of the Iraqi government on one hand and military violations across the border on the other.

A difficulty was found in distinguishing the Turkish obligation to refrain, as a strong State, towards her weaker neighbouring State of Iraq on the basis of the facts given in the above. However, as far as international peace and security are concerned, international law imposes an obligation on the riparian States to prevent conflict and settle disputes by peaceful means. Finally, it was argued that not all the burden of responsibility lies with Turkey, but Iraq also has an obligation to co-operate with Turkey, so that international peace and security would be maintained enabling international economic stability and progress, and the general welfare of nations in the region.

In respect of the customary international law, both States assertions and political decisions have become an increasingly significant source of modern international law.

When no applicable treaty exists, international custom will be applied since both treaty and customary international law are complementary, and have equal authorities as international law. It can be emphasised that the four elements prescribed by Article 38 for drafting a good dynamic treaty without undermining any one of them. Only then the efficiency of international law can be seen clearly.

It is further concluded that international law represented in international agreements, whether general or particular, will become legally binding and accordingly enforceable upon those States that formally accept the agreement made between them by duly signing them. On the other hand, the unsigned treaties, whether general or particular, will bind non-signatories only if they amount to customary law.

Finally, it was argued that there is a need to make particular agreements, like treaties, conventions, protocols, or joint minutes, between the TERB States on the basis of the

said international legal rules and principles, for the purpose of settling different particular issues between them. It has been argued that States should not solely rely on the international legal rules represented in international general agreements along with customary law and other sources of international law; as such rules do not have effective enforcement power or mechanisms due to the fact that they offer only general treaties for water allocation.

Next Steps

It was stated that as an international general agreement, the 1997 UN Convention, which received a high response in international forums, adds a high value to the function of international law, and in fact offers good general agreements to the riparian States. Thus, it is very essential to:

Vigorously examine the main provisions of the 1997 UN Convention corresponding to the main findings in international law in the current Chapter. This proposal will be addressed in Chapter Five.

This step will establish main grounds for analysing those treaties, protocols and joint minutes made between the three riparian States in order to identify their positive and negative elements for the riparian States in Chapter Six

Later, the thesis will bring recommendations on how to build a new phase of transboundary water management to the TERB in Chapter Seven.

CHAPTER FIVE

APPLICABLE INTERNATIONAL WATER LAW IN THE ‘TERB’

5.1 Introduction

This Chapter will specifically be dedicated to the application of international water law within the framework of the regional water management. In the absence of a well established treaty between the riparian States, this Chapter relies on the customary international water law based on the works of the ILC and the principles provided under the UNWC 1997. Subsequently, the Chapter will examine the status of persistent objector under current practice in international law and the impact it has on the UNWC 1997.¹

International water law (hereinafter IWL) is also known as international watercourse law, the international law of water resources, is a term used to identify those legal rules that regulate the use of water resources shared by two or more States.² Article 2 paragraph (a) of the UNWC 1997 broadly defines the word ‘watercourse’ as a system of surface water and groundwater constituting by virtue of their physical relationship a unitary whole.³ An international watercourse is a system of surface water and groundwater which is situated in more than one State. Such a watercourse forms a unitary whole and normally flows into a common terminus.⁴

¹ *Convention on the Law of the Non-navigational Uses of International Watercourses*, May 21, 1997 (not yet in force), reprinted in 36 I.L.M. 700 (1997)

² Wouters, Patricia., et al. 2005. Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model. *International Hydrological Programme, IHP VI, Technical Documents in Hydrology*, (74), at p. 15.

³ Article 2, Paragraph (a) of UNWC 1997. also McCaffrey, S. C., 1998. The 1997 United Nation on International Watercourses. *The American Journal of International Law*, 92(1), at p. 97.

⁴ Article 2 of UNWC 1997.

While historically there have been some disagreements as to the extent of the watercourse system covered, particularly the issue whether to include the complete river basin with all associated tributaries and groundwater systems, a broader definition had to be conceived in recent years.⁵ In other words, State practice in the field of international watercourses was concerned almost exclusively with international rivers and lakes shared with other States, due to a poor understanding of the hydrological cycle.⁶ Subsequently, when technology advanced and a better understanding of hydrology transpired, the definition of the term ‘watercourse’ included not only the main surface water channel and the water contained therein, but also the other components of watercourse system in particular, tributaries and groundwater.⁷

In congregating the abovementioned definitions, a broader applicable international water law can be introduced to the TERB. Thus, the applicable international water law in the regional context of the TERB should denote those treaty-based legal rules that identify the rights and obligations of the riparian States, and regulate the joint use of the TERB as a system of their surface and groundwater comprised by virtue of their physical relationship a unitary whole. In so doing, all the social, economical and legal grounds should be taken into account other than political strategy issues. It has been argued under international custom section that in the absence of treaties to determine and harmonise States together to a particular matter, customary international law can play a very important role to govern interstate relations,⁸ which will be discussed below.

⁵ Shaw, M. N., 1997. *International Law*. (4th Edition). Cambridge University Press atp. 616.

⁶ McCaffrey, Steven C., 2001. *The Law Of International Watercourses: Non-Navigational Uses*. Oxford University Press, at p. 34.

⁷ Ibid.

⁸ Chapter Five, *Supra*, heading International Custom, at p. 100.

5.2 Customary international water law

According to Caponera, rules of customary international law of fresh water resources and general principles can play a very important role not only when agreements exist, but even when there is no agreement governing the relations of States sharing an international river, lake, or drainage basin.⁹ The reason is that from the standpoint of customary rules of international water law, riparian States of any basin may be confronted with problems which are also beyond the reach of existing agreements among them. Most international river treaties have tended, and probably still tend, to deal only with certain water use or management issues. While the utilisation of the TERB multiplies or faces complexity, existing rules in the treaties in force may become inadequate. Some problems could be compared to circumstances similar to those grounds that falls under Articles 61 and 62 of the VCLT 1969.¹⁰ However, the subject of *force majeure* is not discussed in this thesis, but how customary international rules can assist the riparian States identifying rules for governing the development and conservation of the joint use of Basin when there is no practicable legal binding treaty between them.

In considering international customary rules, it is important to examine the provisions in the UNWC 1997 in order to identify the applicable customary international rules applicable to the riparian States. The reasons why such importance is given to the UNWC 1997 are elucidated in the work of the ILC on the UNWC 1997 discussed below.

⁹ Caponera, Dante A., 2003. *National and International Water Law and Administration*. Netherlands, Kluwer Law International., at p.176.

¹⁰ Article 61 provides for supervening impossibility of performance. Convention on the Law of Treaties, May 23, 1969 (entered into force Jan. 1980), reprinted in 8 I.L.M. 679 (1969)

5.3 Work of the ILC on the UNWC 1997

The impetus for the ILC's work on international watercourses came in 1970 when the UNGA recommended the commission take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification.¹¹ Among the most difficult issues that were handled in that session were balancing the right to 'equitable and reasonable utilisation' of an international watercourse with the obligation 'not to cause significant harm' to other watercourse States. The next issue was the relationship between the UNWC 1997 and the existing and future agreements relating to a specific watercourse. The last issue was a mechanism to be used for the peaceful settlement of disputes.¹²

The significance of this work is that prior to the UNWC 1997, the international community did not have a set of rules codified at inter-State level.¹³ Thus, after 25 years of ILC codification efforts, the intricacies of the subject matter as well as of the importance that States ascribed to transboundary watercourses became a clear in the adoption of the UNWC 1997.¹⁴ Furthermore, the Convention codifies many of the principles deemed essential by the international community and procedures that would assist in the management of transboundary freshwater.¹⁵ Despite critics to the UNWC

¹¹ Law of the Non-navigational Uses of International Watercourses, *Supra*, footnote 1. also UN General assembly, *Law of the non-navigational uses of international watercourses*, 1971, resolution 2669 (xxv) on progressive Development and codification of the rules of international Law relating to international watercourses, Yearbook of the International Law Commission, II(2). Document A/Cn.4/244/Rev.1, available at: <http://www.un.org/law/ilc/index.htm> [accessed 10 May 2010] also Abdo, M., 2005. The Relevance and Contribution of the UN Convention toward resolving the problems in the Nile Basin. *CEPMLP Internet Journal*, 15, Article 8, at pp. 1-19. By the year 1974, the Commission had begun preliminary work on the subject. It established a subcommittee whose report proposed that the views of the governments be sought on various issues. Kibaroglu A., 2002. *Building A Regime for the Waters of the Euphrates-Tigris River Basin*. London, Kluwer Law International, at p. 139.

¹² *Ibid.*, p. 141.

¹³ Abdo, *Supra*, footnote 11, at p. 2.

¹⁴ Eckstein, G., 2005. A Hydrological Perspective of the Status of Ground Water Resources Under the UN Watercourse Convention. *Columbia J. of Environmental Law*, 30(6), at p. 531.

¹⁵ Giordano, Meredith A. & Wolf, Aaron T., 2003. Sharing waters: Post-Rio international water management. *Natural Resources Forum*, (2), at pp.163-171.

1997,¹⁶ it was proposed that the UNWC 1997 could be used as a legal model for bilateral or basin wide agreements, since it codifies a number of rules of customary law that apply to international water courses.¹⁷

It began with the most imperative principle, which is the principle of equitable utilisation.¹⁸ Many upstream States argued that the draft articles unjustifiably limited their rights to use and to develop international watercourses.¹⁹ Therefore, it would remain without legal effect in general and customary international law.²⁰ At the same time, several downstream States argued that the articles insufficiently protected their interests, and even criticised the ILC formula in some cases for allowing upstream uses that inflict significant harm to downstream States.²¹ Some States, however, abstained from the vote,²² and subsequently, few States ratified the agreement.²³ However, one

¹⁶ B. Wohlwend considers the work of the ILC as a possible attempt of the ILC to provide support to the recognition of the Helsinki Rules, as in fact, the contents of its Draft adds little or nothing thereto. Bogdanovic, Slavko., 2001. *UN Convention on the law of the non-navigational uses of international watercourses*. Yugoslav Association for Water Law, at p. 18.

¹⁷ Ibid., at p. xi.

¹⁸ Article 5 of UNWC 1997.

¹⁹ Kibaroglu, *Supra*, footnote 11, at p. 141.

²⁰ Turkish Delegation, Mr.. Iskit. *The Official Record of the UNGA*. 1997. UNGA Sixth Committee, 62nd meeting, at p. 12. Available at www.un.org/ga/, accessed 14 August 2007.

²¹ Kibaroglu, *Supra*, footnote 11, at p.141. also McCaffrey, *Supra*, footnote 6, at p. 376. also the presentation made by Mr.. Al-Witri, the Iraqi Delegation. He said that his delegation had voted in favour of UNWC 1997 because it allowed the codification of international law on the uses of international watercourses. Riparian States of such watercourses should cooperate constructively to meet the needs of all in accordance with existing agreements, UNWC 1997 and international law, whether or not they were parties to UNWC 1997. The modification made to the definition of the term "Watercourse State" by the International Law Commission in article 2, subparagraph (c), was unnecessary. A provision should have been added to article 33 concerning arbitration and binding legal solutions to disputes between watercourse States which could not be resolved by other means. Finally, his delegation feared that the number of 35 States established for the entry into force of UNWC 1997 would be insufficient to guarantee its application. *The Official Record of the UNGA*, *Supra*, footnote 20.

²² A number of States who abstained or voted against the text drew attention to a lack of consensus on several of its key provisions, such as those governing dispute settlements. A number of speakers said there was a lack of balance in its provisions between the rights and obligations of the upstream and downstream riparian States. Concern was also expressed that UNWC 1997 had deviated from the aim of being a framework agreement. *Press Release*, May 21, 1997, G.A., GA/9248, reprinted in <http://www.un.org/News/Press/docs/1997/19970521.ga9248.html> [accessed 26 May 2010]

²³ After the political debate on the Draft Articles in the UN, B. Wohlwend said: "...the outcome is most disappointing in that the terminology carefully carved out and the logical sequence engineered, by the ILA in drafting of the Helsinki Rules, have been totally lost to the effect that, notwithstanding the large representation of States in the various ILC sessions, very few ratifications, if any, should be expected." Slavko, *Supra*, footnote 16, at p.18.

can argue that the ICJ not only disregarded those critics, but also went one step ahead to recognise to the principles laid down by the UNWC 1997.²⁴ In the Gabikovo-Nagymaros case between Hungary and Slovakia, the Court quoted the judgment of the Permanent Court of International Justice in the case of navigation on the River Oder from 1929:

“Community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any riparian State in relation to the others....Modern development of international law has strengthened this principle for non-navigational uses of international watercourse as well as evidenced by the adoption of UNWC 1997 of 21 May 1997 on the law of the Non-Navigational Use of International Watercourses by the UN General Assembly.²⁵

For McCaffrey, such a development was considered as an exceptional privilege granted by the ICJ to the development of international law of water resources particularly the UNWC 1997.²⁶

Hence, for those international watercourses without even a partial treaty regime with respect to water use, there is no immediate alternative but to fall back on applicable

²⁴ The UNWC 1997 consists of thirty-three articles and an annex on arbitration and comprises the following parts: Part I, Introduction (Articles 1-4); Part II General Principles (Articles 5-10); Part III Planned Measures (Article 11-19); Part IV, Protection, Preservation, and Management (Article 20-26); Part V, Harmful Conditions and Emergency Situations (Articles 27-28); Part VI, Miscellaneous Provisions (Articles 29-33); Part VII, Final Clauses (Articles 34-37); and Annex on Arbitration. McCaffrey, S., 2001. The Contribution of the UN Convention on the Law of the Non-Navigational uses of International Watercourses. *International Journal of Global Environmental Issues*, 1(3-4), at p. 32. also Kibaroglu, *Supra*, footnote 11, at p.142.

²⁵ Reports of judgments, advisory opinions and orders in the case concerning the Gabcikovo-Nagymaros project. Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slovak), Sep. 25, 1997, 37 I.L.M. 162 (1998)

²⁶ McCaffrey, *Supra*, footnote 6, at p. 185.

rules of customary international law.²⁷ McCaffrey suggests that the negative votes of China and Turkey are probably attributable to their positions as upstream States in ongoing controversies rather than to a dispassionate assessment of the law.²⁸ So, their objections should be seen as political rather than a *bona fide* legal case, with regards to the fact that Turkey has the Great Anatolia Project mainly to support its economic strength as discussed in Chapter Three.

It is worth mentioning that the thesis is only considering the applicable international law at the TERB level. Bearing in mind that both Syria and Iraq have ratified the UNWC 1997,²⁹ it will justify examining the principles provided by the UNWC 1997 in more detail, to contribute to the better joint use of the TERB by the riparian States. To fulfil this objective, the following sections will discuss the scope, substantive norms, obligation to inform, consult and engage in good faith negotiation and dispute settlement mechanisms.

5.3.1 Scope of the UNWC 1997

The UNWC 1997 applies to use of international watercourses and groundwater for purposes other than navigation, and to measures of protection, preservation, and management related to those uses. Not much further discussion is required beyond the explanations given in the earlier section. Nevertheless, it is noteworthy to revisit Articles 1 and 2 of UNWC 1997. The first clearly specifies the scope, while the second has properly defined all the important terms; watercourse, international watercourse, watercourse State, and Regional economic integration organisation. Also, in line with this scope, a new definition was created for the application of international water law

²⁷ Caponera, *Supra*, footnote 9, at p.177.

²⁸ McCaffrey, *Supra*, footnote 6, at p. 315.

²⁹ Meredith, *Supra*, footnote 15, at p. 168.

for the riparian States of the TERB in the same section, McCaffrey states that this definition not only accords with hydrological reality, but also calls to the attention of States the interrelationships among all parts of the system of surface and underground water that makes up an international watercourse. Thus, it should be clear immediately that impacting on one part of the system will generally affect other parts.

5.3.2 Substantive norm: (*Equitable utilisation and No-Significant Harm*)

The term “substantive rules” normally defines those customary or treaty rules that deal with the creation, definition, and regulation of rights and duties.³⁰ Under the 1997UNWC the most fundamental principle of international water law is the principle of equitable and reasonable utilisation and participation.³¹ This principle emerges from the doctrine of limited territorial sovereignty under which a state has a sovereign right to the water resources of an international river basin subject to the corresponding sovereign rights of other states.

Article 5 of the UNWC 1997 which reads as follows:

Paragraph one: “Watercourse States shall in their respective territories utilise an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.”

³⁰ Vinogradov, S., Wouters, P. & Jones, P., 2003. Transforming Potential Conflict in to Cooperation Potential: the Role of International Water Law. *PCCP Publications*, 2, at p. 17. Available at <http://www.unesdoc.unesco.org/images/0013/001332/133258e.pdf>, accessed 16 November 2008.

³¹ Ibid.

Paragraph two: “Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the obligation to cooperate in the protection and development thereof, as provided in the present Convention.”

The above two paragraphs of Article 5 are regarded as the cornerstone of the law of international watercourses. This is requiring that a State must use an international watercourse in a manner that is equitable and reasonable with reference to other States sharing the watercourse.³² Article 6 of UNWC 1997 explains how States are to determine what constitutes equitable and reasonable use by providing a non-exhaustive list of factors to be considered in the determination of an equitable and reasonable use.³³ In addition to physical factors of the watercourse States concerned, the factors relevant to equitable utilisation include protection, development and economy of use of the water resources of a watercourse and the cost of measures taken to that effect.³⁴ The next chapter will discuss Article 6 in detail.

³² McCaffrey, McCafrey, *Supra*, footnote 6, at p. 250.

³³ Article 6 provides that factors relevant to equitable and reasonable utilization are:

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including: (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) The social and economic needs of the watercourse States concerned; (c) The population dependent on the watercourse in each watercourse State;

(d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States; (e) Existing and potential uses of the watercourse; (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; (g) The availability of alternatives, of comparable value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

³⁴ Shaw, M. N., 1997. *International Law*. (4th Ed). Cambridge University Press, at pp.618-619. On the facts how to determine equitable utilisation of an international watercourse it requires taking into account all relevant factors, social and economic needs of watercourse States, population dependent on the watercourse States, existing and potential uses, conservation, protection, development and management of

As to the principle of “no significant harm”, Article 7 paragraph (1) of the UNWC 1997 provides that watercourse States shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.³⁵ McCaffery stated that the term ‘all appropriate measures’ is no different from the term ‘due diligence’ on the grounds that it carries the same meaning but in different words.³⁶ Most writers believe that Article 7 reflects general principles of law, and current customary international law. For example, Shaw viewed this article as a reflection of customary law, since it requires watercourse States to exercise due diligence³⁷ to utilise an international watercourse in such a way as not to cause significant harm to other watercourse States.³⁸ Under this Article, the standard of responsibility for a State causing significant harm seems to be due diligence rather than strict liability³⁹ within the framework of the UNWC 1997. However, Articles 20 to 23 regulate pollution under reasonable and equitable use with a due diligence standard. State responsibility⁴⁰ is the area of public international law governing a breach of international law, resulting from an internationally wrongful act attributed to a State which has legal consequences. Therefore, the ‘State responsibility’ principle requires

water resources and availability of alternatives to the planned of existing uses. Slavko, *Supra*, footnote 16, at p.22.

³⁵ The Official Record of the UNGA, *Supra*, footnote 20.

³⁶ McCaffrey, McCafrey, *Supra*, footnote 6, at p. 254.

³⁷ Due Diligence is a term used for a number of concepts involving either the performance of an investigation of the performance of an act with a certain standard of care. It can be a legal obligation, but the term will more commonly apply to voluntary investigations.

³⁸ Shaw, *Supra*, footnote 40, at pp.619-620.

³⁹ Strict liability in its general meaning makes a person responsible for the damage and loss caused by his/her acts and omissions regardless of culpability (or fault in criminal law terms, which would normally be expressed through a *mens rea* requirement; see Strict liability (criminal)). Strict liability is important in torts (especially product liability), corporations law, and criminal law. For analysis of the pros and cons of strict liability as applied to product liability, the most important strict liability regime, see product liability.

⁴⁰ Freestone stresses that the notion of strict liability with the notion of State responsibility must not be confused under international law. He states “While the rules and principles of international law regarding State responsibility deal with the occurrence and the consequences of internationally wrongful acts, strict liability involves the financial accountability of States under international law for the harmful consequences of acts which are not unlawful under international law.” Freestone, David., & Hey, Ellen. 1996. *The precautionary principle and international law: the challenge of implementation, International environmental law and policy*. London, Kluwer Law International, at p. 60.

that States use due diligence in environmental planning in order to avoid harm to another State.⁴¹ So how does one identify due diligence within the transboundary context? Rieu-Clarke suggested that there is an international minimum standard required of all States to meet their international obligations in which States must establish and enforce sufficient legal, administrative and technical measures to fulfil its obligations to other States.⁴² When such required minimum standard of care is in the field of State's obligation, the obligation on States may differ depending on the potential for harm, and the economic, human and material resources available to the State. Due diligence therefore appears to provide for differentiated standards of care for developed and developing States, tied directly to their particular circumstances.⁴³

Article 7 paragraph (2) advocates compensation for the Watercourse State that has suffered harm as a result of the activities of another State.⁴⁴ McCaffrey states that this part of the Article 7 gives precedence to equitable utilisation over the no-harm doctrine, and is thereby consistent with actual State practice. Therefore, any harm to another riparian State should merely be one factor to be taken into account in determining

⁴¹ Tanzi concludes that State responsibility issues, on the basis of the principle of non-discrimination in the access to national remedies set forth in Article 32 were such domestic remedies for environmental damage are available for nationals of the origin States, the foreign States whose nationals or residents have been the victims of negligent or inequitable transboundary harm would be precluded from engaging the international responsibility of the origin States until such remedies have been unsuccessfully resorted to by its citizens or national companies. In short, Tanzi wants to make this point as a basement for the following point when effective local remedies for the victims of environmental harm exist, one may challenge, on the basis of non-determination rule, the argument according to which the local remedies rule does not apply in cases of transboundary environmental damage. Tanzi, Attila & Arcari, Maurizio., 2001. *The UN Convention on the Law of International Watercourses, A Framework for Sharing*. The Netherlands, Kluwer Law International, at p. 174.

⁴² The reason is that because States owe a higher obligation of care for activities involving hazardous substances than for other pollutants. Rieu-Clarke, A., 2005. *International Law And Sustainable Development: Lessons from the Law of international Watercourses*. IWA Publishing, p. 91.

⁴³ Ibid.

⁴⁴ Article 7 (2) of the UNWC 1997 reads: "where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

whether the harming State's use was equitable.⁴⁵ However, to Tanzi it seems that paragraph (2) is a continuation of paragraph (1) of the same article on the basis of the level of general law, the nature of the present obligation of prevention as one whose violation can only be invoked for lack of due diligence, and not for the complete harm caused.⁴⁶ It is further evaluated that the environmental provisions of the UNWC 1997 to be understood as a universal framework agreement, and one cannot expect either the level of detail or the degree of protection that one might find in a bilateral or regional instrument.⁴⁷

5.3.3 Obligation to inform, consult and engage in good faith negotiation

In order to properly establish the principle of equitable and reasonable utilisation, there must be a mechanism for cooperation. Cooperation is the essential feature of the whole Convention and is enunciated in Article 8,⁴⁸ which provides that watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse.⁴⁹ While Vinogradov argues that this article not only harmonises the substantive with procedural rules laid down by the UNWC 1997,⁵⁰ Tanzi looks at the Article as a clear example of customary international law of the general obligation of a State to cooperate.⁵¹ So, as the principle of a general obligation to co-operate set out by the exchanging of data and information, on notification, consultation and negotiating planned measures: it is part of 'protection, preservation and

⁴⁵ McCafrey, *Supra*, footnote 6, at p.254.

⁴⁶ Tanzi, *Supra*, footnote 41, at p. 173.

⁴⁷ McCafrey, *Supra*, footnote 6, at pp. 254-255.

⁴⁸ Scheumann, Waltina., 2001. *UNWC 1997 on the Law of Non-navigational Uses of International Watercourses*. Deutsches Institut für Entwicklungs politik, at p.12.

⁴⁹ Article 9 of the 1997 UNWC. Convention on the Law of the Non-navigational Uses of International Watercourse, *Supra*, footnote 1.

⁵⁰ Vinogradov, S., Wouters, P. & Jones, P., *Supra*, footnote 30, at p. 19.

⁵¹ Tanzi, *Supra*, footnote 41, at p. 183.

management' and no harmful conditions and emergency situations. In addition, according to Tanzi, this Article could go further in requesting to open up negotiations over the alleged uncooperative attitude of co-riparian States.⁵² As far as the element of good faith is mentioned in this Article, it is sound to state that the term 'good faith' does not add significantly to article 8, since the principle of good faith not only applies to the fulfilment of any international obligation⁵³ but is already explicitly codified in the UN Charter and in the 1969 Vienna Convention on the law of treaties⁵⁴ as was seen in Chapter Four.

One critic states that this Article is naive for not forming provisions to make cooperation compulsory for the purpose of prevention, control and reduction of transboundary impact. In other words, it only demands consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss questions of compensation that provided by Article 7 paragraph (2).⁵⁵ Nevertheless, such an analysis seems to be more on literal interpretation of the law, while both McCaffrey and Tanzi analysed the Article vigorously for what was the intention at the time of drafting the article in UNWC 1997. For McCaffrey, the provision laid down by Article 7 paragraph (2) is a universal agreement,⁵⁶ and each State's location and circumstances are different,

⁵² Consequently, the Article enhances the development of cooperation as an autonomous from legal obligation, building on a consistent body of international practice on the utilisation of shared natural resources and environmental protection as evidenced by treaty law arbitral and judicial decisions, resolutions of intergovernmental and non governmental institutions. Ibid., at p. 184.

⁵³ Ibid.

⁵⁴ Article 2 (2) of the UN Charter provides that, The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter. One of the purposes of the Charter, as provided by Article 1 (3) which reads: to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Article 32 of Vienna Convention on the Law of Treaties 1969. VCLT, *Supra*, footnote 10.

⁵⁵ Scheumann, *Supra*, footnote 48, at p.12.

⁵⁶ McCaffrey, *Supra*, footnote 6, at pp. 254-255.

that is why the language cannot be said compulsory on all the parties. However, when two or more watercourse States enter into a treaty based on the UNWC 1997, then the element of cooperation and good faith will be critically accounted for. That is precisely what Tanzi believes is an 'international obligation'.⁵⁷ Furthermore, it has been established in Chapter Four that a State's cooperation is one of the general obligations under international law although no specific mechanism is established. In other cases than the present UNWC 1997, the nature of inter-State cooperation should be well understood between the cooperating States based on the needs of each State and the necessity to cooperate in the subject matter.

Once the right of equitable utilisation and the obligation not to cause significant harm are well established as substantive norms, the next step is how to implement them. Are there procedural rules to implement the said two norms in a systematic way?

5.3.4 Implementation Instruments and Dispute Settlement Mechanisms

Implementation instruments are the procedural rules which constitute the driving mechanism of the majority of international watercourse agreements. They provide a roadmap for implementing the substantive rules for the management of the watercourse. Procedural rules establish a range of obligations, from a general obligation to cooperate as provided by Article 8,⁵⁸ to obligations concerning data and information exchange, which is Article 9,⁵⁹ with the exception of data vital to national defence or security in

⁵⁷ Tanzi, *Supra*, footnote 41, at p. 183. .

⁵⁸ Article 8 of the 1997 UNWC. Convention on the Law of the Non-navigational Uses of International Watercourse, *Supra*, footnote 1.

⁵⁹ Article 9. *Ibid.*

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 31,⁶⁰ and prior notification as provided by Article 12.⁶¹ As to the consultation, Article 24 paragraph (1) states that “watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism”. Article 24 (2) states; “for the purposes of this article, ‘management’ refers, in particular, to: (a) Planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and (b) Otherwise promoting the rational and optimal utilization, protection and control of the watercourse”.

As long as the above Article is concerned, management is a provision believed by many specialists to be too modest in view of the importance of joint commission. Nevertheless, the article does not go as far as to create an obligation to establish joint commission,⁶² but only encourages States to create international mechanisms.⁶³ Rieu-Clarke concluded that the study of treaty practice shows that States are not obliged under general international law to establish joint institutions relating to their international watercourses.⁶⁴ Although States rarely have similar enough legal, social and economical backgrounds to enable them to reach an equitable and satisfactory agreement on joint management procedures, yet, in the case of TERB, the riparian States are strongly recommended to establish a joint commission for the management of

⁶⁰ Article 31 provides that the obligation of exchanging data and information is rescinded in case they are vital to national defence or security. The Official Record of the UNGA, *Supra*, footnote 20, at p. 708.

⁶¹ Article 12 provides for Notification concerning planned measures with possible adverse effects before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.

⁶² McCaffrey, *Supra*, footnote 6, at p. 258.

⁶³ This is consistent with the aims of a framework agreement, although States were divided on how explicit this provision should be. Vinogradov, S., Wouters, P. & Jones, P., *Supra*, footnote 30, at p. 20.

⁶⁴ However, it should be noted that, in many cases such institutions will be the most appropriate mechanisms by which States co-ordinate their activities relating to international watercourses, and also implement the procedural rules and mechanisms notwithstanding that States have discretion to decide whether or not to establish joint institutions. Rieu-Clarke, *Supra*, footnote 42, at p.203.

the TERB, as will be further discussed in Chapter Seven. Finally, dispute settlement mechanism set by Article 33 can be a backup for article 24, if States fail to establish joint management. The importance of dispute settlement is discussed in the following section.

The UNWC 1997 provides the same standard of dispute settlement mechanisms as implementation instruments.⁶⁵ Article 33 paragraph (1) states that in the event of a dispute between two or more parties concerning the interpretation or application of the present Convention, the parties concerned shall, in the absence of an applicable agreement between them, seek a settlement of the dispute by peaceful means in accordance with the provisions of UNWC 1997.⁶⁶ While Article 9 provides that conflicts are to be prevented by exchanging data and information, and through communication and consultation. If the parties fail to settle the dispute by any of these means, then a State unilaterally has recourse to an impartial fact-finding commission.⁶⁷ Article 33 requires the States to declare upon becoming parties to the UNWC 1997 that they accept as compulsory the submission of disputes to the ICJ or to arbitration in accordance with procedures set out in the Annex to UNWC 1997.⁶⁸ This is one of the reasons why Turkey rejected the UNWC 1997, because it does not want to be bound by the decision of an impartial third party, as will be discussed shortly. Even though the meaning of the independent fact-finding commission is not very clear, because arbitration and judicial settlement are binding in nature, and regarded as a last resort, it

⁶⁵ Scheumann, *Supra*, footnote 48, at p. 12.

⁶⁶ Paragraph (2) states that if the parties cannot reach agreement by negotiation requested by one of them, may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them, or agree to submit the conflict to arbitration or the International Court of Justice.

⁶⁷ *Ibid.*

⁶⁸ McCaffrey, *Supra*, footnote 6, at p. 261.

is agreed that the variety of mechanisms available such as diplomatic and judicial to the parties ensures that if States are willing, disputes can be solved peacefully.⁶⁹

5.4 Turkish Persistent Objection to the UNWC 1997

As previously mentioned, Turkey voted against the UNWC 1997. When examining the legitimacy of such action and its impacts on Iraq and Syria, one question arises: can Turkey be considered as a persistent objector to the UNWC 1997?

First of all, Thirlway argued that what a State declares should be evaluated with reference to the occasion on which the statement was made.⁷⁰ In the *North Sea Continental Shelf* cases, Judge Lachs stated the general principle that a dissenting State is entitled to contest a rule if it can demonstrate its persistent objection to that rule either as a member of a regional group or by virtue of its membership of the international community.⁷¹ Within traditional doctrine, the ICJ has recognised that the passage of only a short period of time is not necessarily a bar to the formation of a new rule.⁷² Because of this, the question is sometimes raised as to whether the word ‘custom’ is suitable to a process that could occur with great rapidity. Today, there is a widespread agreement, as Schiffman mentioned, that based on a considerable scholarly interest, it is useful to recall that questions of persistent objector status are in practice quite rare.

⁶⁹ Scheumann, *Supra*, footnote 48, at p.13.

⁷⁰ For example, State practice for the majority of States will be at meetings of international organisations, particularly the UN General Assembly, by voting or otherwise expressing their view on matters under consideration. Thirlway, H., 1972. *International Customary Law and its Codification*. A. W. Sijthoff-Leiden, at p. 58.

⁷¹ Judge Lachs, *North Sea Continental Shelf cases*. 1984. ICJ Reports. at p. 229, 232, International Court of Justice. Available at <http://www.icj-cij.org/docket/files/51/5557.pdf>, accessed 27 May 2009.

⁷² It is admitted that a norm of international law is established if States act in conformity with it and the international community accepts that norm as obligatory under law. This development may take some time or it may happen quickly. States acting through their officials, participate in the evolution of this law by their behaviour as obligated under international law. Some maintain that individual States must accept the norm as law. But clearly consent is required only by international community and not by all individual States. Charney, J. I., 1993. Universal International Law. *The American Journal of International Law* 87(4), at p.536.

According to the persistent objector rule, if a State objects to the establishment of a norm while it is becoming law and objects persistently and continually up to the present, it is exempt from that rule.⁷³

There is also a school of thought that considers the concept of ‘persistent objector’ of no value in international law.⁷⁴ Accordingly, a State may act with subjective *opinio juris*, but it quickly becomes evident whether the rest of the community believes this act to be consistent with international law. Therefore, it really does not matter whether a State believes itself to be conforming to international law or not, because the interactions that occur over that issue with other actors in the system will demonstrate what is the consensus on the particular rule. Furthermore, unless the State explicitly asserts itself as a persistent objector to the rule, the quality of that State's actions will be judged by the rest of the actors in the system. Eventually, the behaviours that establish norms and rules that are acceptable to the majority of States will be the ones that attain the status of law.

As Professor D'Amato has asserted, norms which are no longer considered acceptable will be replaced or modified.⁷⁵ Charney clearly takes a stricter stand against the persistent objector, positing that a State should be bound by a norm if it did not show any objection when the norm was being established. However, because the amorphous nature of customary lawmaking makes difficult to fix the precise date at which any customary law norm is established, a State's ability to object the norm in a timely

⁷³ Ibid., at p.538.

⁷⁴ Schiffman, Howard S. Esq. Re: Customary International Law - Persistent Objector. *International Law Help Forum*. Available at www.InternationalLawHelp.com, accessed July 2008.

⁷⁵ International Legal Theory. 1998. *Publication Of The American Society Of International Law Interest Group On The Theory Of International Law*, IV(1). Available at http://law.ubalt.edu/downloads/law_downloads/ILT_04_1_1998.pdf, Accessed 20 July 2008.

manner is limited.⁷⁶ Even if the objecting State meets the time requirement of the rule, still it faces other barriers, such as the requirement that persistent objection must be continuous to the present day and if any significant gap in the series of objections is evident, it loses the position.⁷⁷ Finally, Charney mentions that the ICJ has referred to the persistent objector rule in two judgements, but only as *dicta*, and decided the cases on other grounds to confirm that State practice and other evidence do not support the existence of the persistent objector rule.⁷⁸ To apply this to the case of Turkey, firstly it has not shown objections to the rules prescribed in the UNWC 1997 from the time the ILC began meeting for the purpose of UNWC 1997, but rather it was actively involved in drafting the articles of UNWC 1997.⁷⁹ Further, Turkey seems unlikely to be consistent in its treaty practice with respect to Iraq. Therefore, claiming its persistent objection to the UNWC 1997 could weaken legal grounds. A discussion on the grounds for Turkish inconsistency follows.

The Turkish delegate argued that in regard to article 6 that while the deletion of the word “pedagogical”, yet drafting of articles 5 and 7 created qualms. For example, in Article 5, the word ‘interests’ could give rise to various interpretations and looks too vague vis-à-vis the importance of the article. As for the text of article 7, despite the improvements made by the Chairman, the term ‘duly taking account’ lacks accuracy, particularly concerning the relative priority of the principles stated in articles 5 and 7. Consequently, it is not acceptable to recognise the group of Articles in question and therefore, this matter should be put to the vote.

⁷⁶ Charney, *Supra*, footnote 72, at p.538.

⁷⁷ *Ibid.*, at p. 539.

⁷⁸ *Ibid.*, at p. 540.

⁷⁹ Official reports from the ILC documents shows Turkish delegation’s active involvements to the draft articles although it voted against it subsequently. The presentations made by the Turkish Delegation throughout the drafting process can be seen as a good example. The Official Record of the UNGA, *Supra*, footnote 20, at p. 12.

Mr.. Iskit, the Turkish delegate, stated further that his delegation would vote against article 33 and its annex on arbitration, as they believed it inappropriate that a framework convention should provide for compulsory measures for the settlement of disputes and that the issue should be left to the discretion of the States concerned. He concluded from the discussion that there was no consensus on the major or fundamental provisions and articles of the draft convention. While Article 5 expressed essential principles and concepts on issues such as equitable, reasonable and optimal utilisation, as a whole it remained unacceptable to the Turkish delegation, which had expressed objections or reservations concerning the preamble, article 2, paragraphs (a) and (b), article 3, article 10, the whole of part III except for article 11, articles 22, 23 and 32, and article 33 and its annex. That is why the Turkish delegate requested a vote on the draft convention as a whole, and wished to explain before the voting the fundamental reasons for its decision to oppose it.⁸⁰

However, Article 5 of the treaty of TFNRIT 1946, which is still in force, provides that “the High Contracting Parties undertake, in conformity with the provisions of Article 33 of the United Nations Charter, to settle by peaceful means all disputes which may arise between them and to refer to the UNSC, in conformity with the provisions of Article 37 of the Charter, any disputes which they may fail to settle by these means.”⁸¹ See Annex 1 for the full text of TFNRIT. The wording used in this Article does, in fact, stand in conformity with the Article 33 (1) of the UNWC 1997 which states that ‘In the event of a dispute between two or more parties concerning the interpretation or application of the present Convention, the parties concerned shall, in the absence of an

⁸⁰ Ibid.

⁸¹ *Treaty of Friendship and Neighbourly Relations between Iraq and Turkey*, Mar. 29, 1946 (entered into force May 10, 1948), U.N.T.S. (1949), reprinted at http://untreaty.un.org/unts/1_60000/1/39/00001912.pdf [accessed 27 May 2010]

applicable agreement between them, seek a settlement of the dispute by peaceful means in accordance with the following provisions.’ The only difference is that the UNWC 1997 provides a detailed mechanism for dispute settlement. Thus, it can be argued that such an objection puts Turkey in the position of inconsistency with its previous treaty with Iraq.

Finally, Charney argues that the position of persistent objector gains the objecting State very little since such a position does not immunise the persistent objector from the pressure that other States may impose upon it to abide by the norm. This pressure can be in political form and at the same time the legal right of the persistent objecting State does not provide any defence in practice if the persistent objection violates the international law, which is set forth in States’ rights and obligations that been discussed in Chapter Four. It is important to note that neither Iraq nor Syria are strong States compared to Turkey, and are less able to apply political pressure on Turkey to abide by the UNWC 1997; such a position could last for indefinite period thereby denying both Syria and Iraq equitable utilisation of the TERB.⁸²

After all, if Turkey successfully accedes to the EU, Turkey should accept cooperation with its co-riparian States. According to the European Union Water Framework Directive (hereinafter the EU WFD) if an international basin extends beyond the

⁸² It is noteworthy to explain that the purpose of the new rule and the response of the international community can be two important factors in directing the opposing States to be more lenient towards a particular rule or convention. For example, 103 States voted in favour of the 1997 Convention, whereas only 3 States voted against it. Turkey voted against the UNWC 1997, but it may not be able to maintain this position even though China and Burundi also voted against the UNWC 1997. The reason is that the opposing States are not in the same region to create a regional opposition group, and all the three States have different cultural, geographical and economic backgrounds. The number of the States which will vote for the UNWC 1997 may increase to a greater number, because of the compelling fact that water resources are scarce and all have the right to access such precious resources. Hence, it must be emphasised that although States may stand against the UNWC 1997, but once it becomes closer in representing general customary international law, States may still be bound by it even though are not party to UNWC 1997. Therefore, Turkey, China and Burundi, may well have to endure the recognition of the UNWC 1997 sooner or later.

territories of the EU, the WFD encourages Member States to establish cooperation with non-Member States and thus manage the water resource on a basin level.⁸³

5.5 Competence of the UNWC 1997

This section examines two issues regarding the UNWC 1997. Firstly: whether the UNWC 1997, which recently received its nineteenth ratification,⁸⁴ is competent to reflect customary international law. Secondly, whether the 1997 UN Convention alone can be successful in regulating the relationship between the riparian States, and accordingly prevent disputes arising between them?

As far as the competence of the UNWC 1997 is concerned, there are differing views. Firstly, Giordano and Wolf were not very enthusiastic about the UNWC 1997 in general. They argued that the approval of the UNWC 1997 by UN member States does not resolve many legal questions. For example, as far as the binding nature of the convention, so far only seventeen countries are party to it, which is well below the

83 EU Water Framework Directive entered into force on 23 October 2000. Article 35 of the Directive reads "...For river basins extending beyond the boundaries of the Community, Member States should endeavour to ensure the appropriate coordination with the relevant non-member States. This Directive is to contribute to the implementation of Community obligations under international conventions on water protection and management, notably the United Nations Convention on the protection and use of transboundary water courses and international lakes, approved by Council Decision 95/308/EC and any succeeding agreements on its application." Directive 2000/60/EC of the European Parliament and of the Council establishing A framework for Community action in the field of water policy, Oct. 23, October 2000, (entered into force Dec. 22, 2000), OJ (L 327), *reprinted at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:327:0001:0072:EN:PDF> [accessed 25 May 2010]. *also* Nilsson, Susanna & Langaas, Sindre., 2006. International River Basin Management under the EU Water Framework Directive: An Assessment of Cooperation and Water Quality in the Baltic Sea Drainage Basin. *Royal Swedish Academy of Sciences, Ambio*, 35(6), at p. 304. Available at <http://ambio.allenpress.com/archive/0044-7447/35/6/pdf/i0044-7447-35-6-304.pdf>, accessed 11 March 2009.

⁸⁴ On 19 May 2010, Guinea-Bissau ratified the 1997 UNWC. *Convention on the Law of the Non-navigational Uses of International Watercourses*, May 21, 1997 (not yet in force), U.N.T.C. XXVII 12. Environment, *reprinted at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-12.en.pdf> [accessed 26 May 2010].

requisite 35 instruments of ratification, acceptance, accession or approval needed to bring the UNWC 1997 into force.⁸⁵

Next, the UNWC 1997 offers general rules to co-riparian States, however, Eckstein argued that the language used in the UNWC 1997 is vague⁸⁶ with some contradictions in the terms used that could result in disagreements on how to interpret the principles contained therein.⁸⁷ Moreover, the way the enforcement mechanism is structured provides no practical back up for the guidance provided by the UNWC 1997. For instance the ICJ hears only cases on very specific legal points, and with the consent of the involving parties. So, it will be very rare for cases like Gabčíkovo-Nagymaros on the Danube River between Hungary and Slovakia to happen.⁸⁸

However, Wouters believes that the UNWC 1997 provides predictable and pragmatic mechanisms by which States can lawfully develop their shared international waters, especially in the circumstances where no other agreement exists.⁸⁹ It is suggested that accession to the UNWC 1997 has another advantage, which is to enhance the opportunity for cooperation as well as attract international financing for the development of the water resources within the entire basin.⁹⁰ So, although Meredith and Wolf have made valid comments on what has happened so far and how politics have

⁸⁵ Meredith, *Supra*, footnote 15, at p. 168.

⁸⁶ While development of the UNWC 1997 is greatly increased international attention on global ground water resources, there is still a great deal of misunderstanding of the subject. For example, the ILC's use of the term "confined" ground water to describe ground water that is unrelated to surface water is troubling for its potential to generate considerable misunderstanding. Eckstein, *Supra*, footnote 14, at p. 563.

⁸⁷ The vague, broad and general term incorporated in the UNWC 1997 can be defined and in certain cases quantified in a variety of different ways. *Ibid*.

⁸⁸ The UNWC 1997 only addresses those groundwater bodies that are connected to surface water systems, i.e. unconfined aquifers, yet several nations are already beginning to tap into confined groundwater systems, many of which are shared across international boundaries. *Ibid*.

⁸⁹ Wouters, P., Salman, M. A. & Jones, Patricia., 2000. The Legal Response to the World's Water Crisis: What legacy from The Hague? What future in Kyoto? *World Water Forum, The African Water Page*. Available at <http://www.africanwater.org/documents.htm> accessed 5 February 2008.

⁹⁰ *Ibid*.

affected in inter-State relations in managing their shared waters, their focus on the negative aspects of the UNWC 1997 could undermine the importance of the UNWC 1997. One should not forget that the spirit behind the UNWC 1997 is to make the riparian States of any basin reaches an outstanding conclusion that rebuts the three above arguments. Thus, there should be no specific reason why the riparian States of TERB come to entering a treaty that meets their needs equitably no matter what circumstances prevail. In this context, Kibaroglu referred to a conclusion made by Wolf that in almost all of the disputes that have been resolved, particularly in arid or exotic river basins, the paradigms used for negotiations have not been ‘rights-based’ at all, neither on relative hydrography nor specifically on chronology of use but rather ‘needs-based.’ Later on she defined the word ‘needs’ to one or a combination of irrigable land, population, or the requirements of a specific project, or a sector.⁹¹ At last, the evolution of watercourse treaty practice has witnessed a transition from a model of restricted sovereignty to a more restrictive definition of sovereignty under the theory of community of interest or a community of property model.⁹² The allocation of water resources based on equitable apportionment under the community of interest theory is actually based on a concept of equitable participation under the theory of community of property.⁹³

On the whole, international water law tends to address the efficiency of existing uses and allocations, while ILC Draft Article 10 emphasises a ‘special regard’ for ‘vital

⁹¹ Kibaroglu, Aysegül. Water For Sustainable Development In The Euphrates-Tigris River Basin. *Middle East Technical University Department*, at pp. 5-6. Available at <http://www.gap.metu.edu.tr/html/yayinlar/waterforsustainableAKibaroglu.pdf>, accessed 31 July 2008.

⁹² Dellapenna, Joseph W., 1994. Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty v. Community of Property. *Journal of International Law*, 27, at p. 42. Available at <http://www.heinonline.org/HOL/Page?collection=journals&handle=hein.journals/cwrint26&id=33>, accessed 12 May 2009.

⁹³ Cohen, Jonathan E., 1991. International Law and the Water Politics of the Euphrates. *New York University Journal Of International Law and Politics*, (24), at pp. 511-515.

human needs.’ Thus, through cooperation, existing allocations would satisfy equity principles by responding to existing demand. Reaching equity in transboundary water allocations requires increasing conservation and efficiency, improving watercourse management and protection and adapting economic structures to satisfy water needs.⁹⁴ Such a need is the main impetus towards accepting the UNWC 1997 by the international community, because of the following reasons.

First of all the UNWC 1997 is the first ever universal convention on water resources. The success of the UNWC 1997 does not actually depend on the ratification of it by the required number of States⁹⁵ as provided by article 36,⁹⁶ but rather its importance that symbolises its status as the most authoritative guideline of general principles and rule governing the non-navigational uses of international watercourses.⁹⁷ On the other hand, Wouters’ focus majors in cooperation potential by prioritising hydro-legalism over hydro-politics. Wouters argued that a solid foundation for the legal response to water scarcity is provided by the UNWC 1997. The reasons are both the substantive norms laid down by Articles 5 and 7, and the well developed body of procedural rules in a comprehensive framework devoted to address the multitude of issues arising out of present and future conflicts over water. Thus, when management of transboundary watercourses become an issue, the UNWC 1997 is designed as an authoritative

⁹⁴ Ibid., at pp.352-355.

⁹⁵ Abdo, *Supra*, footnote 11, at p. 17.

⁹⁶ Article 36 paragraph (1) states that: The present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the UN.

⁹⁷ McCaffrey, *Supra*, footnote 6, at p. 261. also Abdo, *Supra*, footnote 11, at pp. 17-18.

statement of relevant international law to play a major role in solving those transboundary issues.⁹⁸

To that extent, the effects of international law will have immense influence to solve future transboundary conflicts as well as the current conflicts.⁹⁹ Therefore, if States are bound by the principles of international law underlined by the UN Charter, the UNWC 1997 is unlikely to deviate from international law since the latter one emphasises the role of former one, but in water issues. In a view expressed by McCaffrey, when he referred to the UNWC 1997, he said:

“Consideration of UNWC 1997 would not be complete without briefly looking at the question of the extent to which UNWC 1997 reflects rules of customary international law. In my view, it may be said with some confidence that the most fundamental obligations contained in UNWC 1997 do indeed reflect customary norms.....While the International Law Commission does not take a position whether a particular article or paragraph of one of its drafts is a codification of international law or an effort to progressively develop that law, it seems reasonable to conclude on the basis of state practice that at least three of the general principles embodied in UNWC 1997 correspond to customary norms. These are the obligations to use an international watercourse in an equitable and reasonable manner, to use such a watercourse in such a way as not to cause significant harm to other riparian states, and

⁹⁸ Wouters, P., 1999. The Legal Response to International Water Scarcity and Water Conflicts: The UN Watercourses Convention and Beyond. *Natural Resources Forum, Dundee*, at p. 49. Available at http://www.africanwater.org/pat_wouters1.htm#_ftnref2 accessed 19 February 2008.

⁹⁹ For example, the influence of UNWC 1997 is also visible in the Nile Basin. The language of the Nile Basin Initiative appears to go after the lead of the UN Watercourses Convention in drawing together the equitable utilization and no harm principles. The foundations of the Shared Vision and the Subsidiary Action Programs of the Nile Basin Initiative are the principles of equitable and reasonable utilisation, no significant harm, cooperation in the management and development of the water of the Nile and its sustainable utilization. Abdo, *Supra*, footnote 11, at pp. 17-18.

to notify potentially affected riparian states of planned measures on an international watercourse.” (McCaffrey)¹⁰⁰

From the arguments mentioned in the above, it can be stressed that the UNWC 1997 reflects customary international law that can be binding on Turkey. Although considering the seventeenth ratifications to UNWC 1997 might not be enough to make the UNWC 1997 enter into force, one can pretend that as a consequence of more water scarcity and conflicts between States in the future, States will come forward to cooperate and recognise the UNWC 1997 and abide by it.

On the other hand, if the number of the States which voted for the UNWC 1997 is considered, which are 103 votes; it can be argued that the UNWC 1997 was globally accepted and will become a primary resource for transboundary water law. The high number of votes shows how the international community is desperate to codify rules governing their shared watercourses, since it is the main problem of the whole world in the twenty first century. At the same time it shows how attractive the UNWC 1997 is in the eyes of the international community, which is the realisation of more than twenty five years of thorough and successful work by the ILC. Thus, the UNWC 1997 may no longer be categorised as a particular international law, but progressively within the framework of general international law.

In addition, Lammers concluded that the UNWC 1997 is believed to be a remarkable achievement because it purports to create a global treaty regime laying down the basic international legal principles governing the non-navigational uses of international watercourses. Also it promotes an optimal integrated management of the water

¹⁰⁰ McCaffrey, *Supra*, footnote 6, at pp. 259-260.

resources of an international watercourse while striking a fair balance between the rights and obligations of both upstream and downstream watercourse States.¹⁰¹

Before considering this question, let us firstly assume that the UNWC 1997 has been signed by the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations, as required by Article 36 of the UNWC 1997.¹⁰² Not forgetting that only two of the TERB riparian States have signed the UNWC 1997, namely Iraq and Syria, means that the UNWC 1997 is unlikely to be successful due to the refusal Turkey to sign it, and as a result, UNWC 1997 will not, *ab initio*, be legally binding and accordingly enforceable upon all TERB states.

However, supposing that the State of Turkey had duly signed the UNWC 1997, which resulted in making it legally binding, and accordingly enforceable upon it, or that the provisions of UNWC 1997 have become binding and accordingly enforceable for reasons other than formally accepting it, for example, its key principles are reflecting customary international law, what will happen next? The fact that international general agreements will become legally binding and accordingly enforceable is not alone sufficient, but rather calls for another matter to be taken into account. That matter is represented in the implementation of the provisions of contained in the UNWC 1997, i.e. the possibility and feasibility of those implementation instruments. Referring to the

¹⁰¹ Lammers, Johan G., 2008. Potential Effects From The Non-Entry Into Force Of The Un Watercourses Convention, The Un Watercourses Convention: Legacy, Prospects And Value For The Realization Of International Policy Goals. *World Water Week Stockholm, Sweden*, at pp.8-10. Available at: http://www.worldwaterweek.org/Downloads/UNWC_Seminar_Lammers%5B1%5D.pdf, accessed 22 April 2009. also Loures, Flavia, Rieu-Clarke, Alistair & Vercambre, Marie-Laure., 2009. Everything you need to know about the UN Watercourses Convention. *WWF Publication*, at pp.1-3. Available at http://www.unwater.org/downloads/wwf_un_watercourses_brochure_for_web_1.pdf, accessed 10 May 2010.

¹⁰² Article 36 (1) The present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

UNWC 1997, its provisions are not that easy to be implemented even if it becomes binding and accordingly enforceable due to two main reasons as follows.

Firstly, the UNWC 1997 includes provisions that correspond to general agreements to riparian States. The provisions of those agreements are vague and use contradictory language that result in varied and indeed conflicting interpretations of the principles contained therein.

Secondly, as a result of the fact above, there is no practical enforcement mechanism to back up the UNWC 1997. Therefore, it can be concluded that, it is not sufficient for the purpose of effecting the implementation of UNWC 1997 and other general conventions, to be legally binding and enforceable upon the signatories. It is, in addition to that, required to contain particular, not just general, provisions accepting different interpretations, and furthermore there shall be a practical enforcement mechanism to be clearly stated in UNWC 1997 for the purpose of implementing it successfully. Furthermore, that the UNWC 1997 was signed by only 12 countries in 2002 is another obstacle to implementation, when at least thirty-five instruments of ratification, acceptance, accession, and approval are needed to bring the convention into force.

So, international legal rules represented in international general agreements do not have effective enforcement power, and only offer general rules for water allocation. Also, since it was argued earlier that the UNWC 1997 alone may not be sufficient to govern transboundary water management of the TERB, because the riparian States do not have control over alteration of its provisions. Nevertheless, relying on its provisions will be necessary to create a proper legal binding treaty between the riparian States.

5.6 The application of *lex lata* and *lex ferenda*

In identifying the legal rights of the riparian States, a reference to a State practice is decisive to identify the basis of the riparian States' legal rights. It is argued that State practice is clearly descriptive, and *opinio juris* is inherently ambiguous in nature because statements can represent *lex lata* (what the law is, a descriptive characteristic) or *lex ferenda* (what the law should be, a normative characteristic). Robert argued that only statements of *lex lata* can contribute the formation of custom.¹⁰³ However, modern custom seems to be based on normative statements of *lex ferenda* seen as *lex lata* for three reasons:

First of all, attempts to distinguish *lex lata* and *lex ferenda* often rely on differentiating between codification and progressive development of the law. Codification means the formulation and systemising of rules that already exist in the form of practice accepted as law, which is *lex lata*, while progressive development is an overtly political act concerned with formulations of what the law should be *lex ferenda*. However, even though codification is meant to be scientific, not political, formulating a general rule from actual practice necessarily entails some level of law creation. Codification involves legal judgements because it seeks to form a coherent rule in the face of inconsistent practice, which requires some crystallisation of *lex ferenda*.¹⁰⁴

Secondly, it is difficult to distinguish between codification and progressive development by examining the language of treaties and declarations. For example, treaties and resolutions might form customs when expressed in obligatory language, such as 'must' rather than aspirational terms, such as 'should'. However, Robert said that the ICJ has

¹⁰³ Roberts, A. E., 2001. Traditional and Modern Approaches to Customary International Law, A Recodification. *The American Journal Of International Law*, 95(4), at p. 763.

¹⁰⁴ Ibid.

relied on resolutions couched in both mandatory and non-mandatory language. Further, mandatory language is still ambiguous because it can represent a moral, treaty, or customary obligation. Thus, whether a declaration or treaty provides statement of what the customary law is or should be, cannot be determined by reference to mandatory language alone.¹⁰⁵

Thirdly, treaties and resolutions often use mandatory language to prescribe a model of conduct and provide a catalyst for the development of modern custom. Also, treaties and declarations do not merely declare the current State practice on moral issues, but rather they often reflect a deliberate ambiguity between actual and desired practice, designed to develop the law and to stretch the consensus on the text as far as possible. As a result, modern custom often represents progressive development of the law masked as codification by phrasing *lex ferenda* as *lex lata*.¹⁰⁶

Prior to the UNWC 1997, considering the work of the ILA on the rules of international water resources, Wohlwend regards the Helsinki Rules as declaratory, in the sense that they show what the rules of international law are or should be. Even though the 1966 Helsinki Rules are considered soft law, nevertheless their content should be given more weight than mere recommendation because it forms part of *lex lata* today.¹⁰⁷ Wouters also stated that “for many nations, the Helsinki Rules are considered to embody the essence of the international rules that apply in the field of transboundary water law.”¹⁰⁸ Hence, the ILA acted as midwife in the codification of the law regarding international

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ That is why their authors paid great attention to the difference between *de lege lata* rules that are considered as obligatory ones, and *de lege ferenda* rules which in fact should be considered as recommendations or evolving rules of soft law.

¹⁰⁸ Slavko, *Supra*, footnote 16, at p. xii.

watercourses when the UN General Assembly referred International Law Commission for such works.¹⁰⁹

5.7 Conclusion

Chapter Five was dedicated to the application of customary international water law and its substantive norms laid down in the UNWC 1997. Before those norms were discussed, the researcher endeavoured to create a comprehensive definition of applicable international water law in the regional context of the TERB. The applicable international water law in the regional context of the TERB should denote those treaty-based legal rules that identify the rights and obligations of the riparian States, and regulate the joint use of the TERB. In so doing, all the social, economical and legal grounds should be taken into account other than political strategy issues.

Later, the Chapter discussed customary international water law and the significance of the work of ILC on the UNWC 1997. The most important outcome of the ILC's work was that it codified international water law through a set of rules at inter-State level for the international community, which did not expressly exist in the past.

Within the subjects of the substantive norms, both the principle of equitable and reasonable utilisation, as laid down by Article 5, and the principle of no significant harm provided under Article 7 were analysed in detail. Next, the chapter dealt with the issue of the Turkish persistent objection to the UNWC 1997. It was found that generally a dissenting State is at liberty to challenge a rule in question if it can demonstrate its

¹⁰⁹ Bourne suggests that there is evidence that the 1966 Helsinki Rules is accepted by the international community as customary international law, since it is been applied by tribunals in India in adjusting interstate water disputes. The best evidence of the influence of the 1966 Helsinki Rules and their status as international law is seen in the work of International Law Commission on international water courses, which later on it was concluded that the principles of equitable utilisation is a of customary international law. Bourne, C. B., 1997. *International Water Law. International Law of Water Resources, Contribution of International Law Association (1954-2000)*. London, Kluwer Law International, at p. 281.

persistent objection to that rule by virtue of its membership in the UN or as a member of a regional group based on their national interests. However, when applying the above to the Turkish case, it can be seen that Turkey is inconsistent in its treaty practice with respect to Iraq because it agreed with the Articles of the 1946 Friendship Treaty, but not with the similar provisions provided by the UNWC 1997. Therefore, Turkey has weak legal grounds to claim its persistent objection to the UNWC 1997. Finally, it was argued that the number of the States ratifying the UNWC 1997 is likely to increase because of the compelling fact that water resources are finite and all have the right to access such precious resources. As the number of the ratifying States increases, it becomes closer in representing general customary international law. Hence, States may still be bound by it even though are not party to the UNWC 1997.

Furthermore, the Chapter focused on the competency of the UNWC 1997 by analysing whether the UNWC 1997 and its content of substantive and procedural rules actual represent customary international law. It was emphasised that since the substance of UNWC 1997 adheres to binding instruments within the framework of general international law, it may no longer fall under particular international law, especially when water scarcity and conflict between States forces them to cooperate under the UNWC 1997 and abide by it.

Finally in considering the issue whether the 1997 UN Convention is a self-sufficient in regulating the management of the TERB between the riparian States, the researcher discovered that international legal rules represented in international general agreements do not have effective enforcement power, and only offer general rules for water allocation. Having realised that the UNWC 1997 only reflects progressive particular international law, it can be suggested that the UNWC 1997 alone may not be sufficient

to govern transboundary water management of the TERB, because the riparian States do not have control over the alteration of its provisions. Nevertheless, relying on its provisions will be necessary to create a proper legal binding treaty between the riparian States. This conclusion, contributes to the argument about the great importance of particular agreements to be made and concluded between the riparian States, because they will have a control over the contents of any agreement made between them, i.e. they will be able to state particular provisions that serve the interests of each of them, which will not be subject to different and conflictive interpretation.

Next Step

In the application of international water law in the context of the Tigris and Euphrates River basin, this conclusion provides the cornerstone for the question: How can the UNWC 1997 strengthen the legal framework at the regional level of the Tigris-Euphrates riparian States? Before answering this question, it is imperative to examine the legal positions of the riparian States, which will be discussed in Chapter Six.

CHAPTER SIX

LEGAL REGIME OF THE INTER-STATE RELATIONSHIPS

6.1 Introduction

While Chapter Four focused on the applicable international law to the riparian States of the TERB, Chapter Five examined the applicable international water law in the regional context of the TERB. This Chapter will examine the legal positions of the riparian States in light with the previous two Chapters. At the end of this Chapter, a foundation will be laid for the creation of a proper and reliable binding treaty between the riparian States of the TERB. The value added by this chapter is the identification of the common issues between the riparian States and consideration of how their legal positions can be approached and pursued. At first, a historical analysis of the past and present treaties and protocols between the riparian States of the TERB will be discussed.

6.2 Past and present treaties and protocols between the riparian States of the TERB

Numerous articles and books have mentioned that there is no specific and binding treaty between Iraq, Syria and Turkey as a three party treaty, but bilateral treaties are observed. That is especially occurred when these States thought it necessary to cooperate or at least avoid tension, they have met for negotiations. The significant cooperation negotiations are be mentioned below:

In 1946 the first important bilateral treaty between Iraq and Turkey was made, which states that Turkey has to consult with Iraq before building any construction on the Euphrates so that the needs of the two countries can be satisfied. It was more on cooperation that Art. 5 of the Protocol No 1, which is relative to the regulation of the

waters of the Tigris and Euphrates and of Their Tributaries, states that prior notification about water development projects will be passed to Iraq in order that these works may as far as possible, be adapted, by common agreement, to the interests of both Iraq and Turkey.¹

In 1964, Turkey and Syria have undergone a kind of cooperation that Sahan considered 'unsuccessful'. She based her argument on historical grounds with the case of the unsuccessful Turkish proposal to link the rivers Orontes and Euphrates, the Syrian Government viewed the process as accepting the Turkish occupation of Sandjak d'Alexandrette and therefore refused.²

In 1965, Turkey, Syria and Iraq held further negotiations for cooperation, which were unsuccessful. The reasons were that Iraq demanded 18 billion m³/year of water from the Euphrates river, Turkey demanded 14 billion m³/yaer, and Syria demanded 13 billion m³/yaer. However, actual total supply is 32 billion m³ at *Hit*, which makes the combined demand 1.4 times higher than the supply.³

In 1967, Syria and Iraq experienced a similar attempt at cooperation that was categorised as 'unsuccessful'. This time Iraq demanded 16 billion m³/year from the Euphrates, while Syria wanted to concede a maximum of 9 billion m³/year to Iraq,⁴ half of that demanded by Iraq in 1965.

¹ *Treaty of Friendship and Neighbourly Relations between Iraq and Turkey*, Mar. 29, 1946 (entered into force May 10, 1948), U.N.T.S. (1949), reprinted at http://untreaty.un.org/unts/1_60000/1/39/00001912.pdf [accessed 27 May 2010]

² Sahan, Emel., Zogg, Andreas, & Mason, Simon A., 2001. Sustainable Management of international Rivers Case-Study: Southeastern Anatolia Project in Turkey–GAP. *Seminar for Doctoral students at the ETH Zurich, Swiss Federal Institute of Technology, Zurich*, at pp. 5-12. Available at http://www.eawag.ch/research_e/apec/Scripts/GAP07feb01.pdf, accessed 12 August 2008.

³ Ibid.

⁴ Ibid.

In 1975, there was conflict between Syria and Iraq which was followed by some cooperation between the States after third party intervention. The conflict started when Syria filled the barrage of Tabqa (capacity 14.2 billion m³) after its completion, this barrage together with the barrage in Turkey is said by Iraq to reduce the flow by 9 billion m³, from the original of 28 billion m³. The Arab League and Saudi Arabia offered to mediate after Syria moved armed forces from its border with Israel to the Iraqi border. Saudi mediation efforts were finally successful helped by pressure from the USSR on both Syria and Iraq. Later, a declaration of principles was made but was not followed by official signature. It is believed that there was a secret agreement signed by the two governments. Although other factors besides water resources were very important in this crisis they are not relevant to this thesis and therefore not discussed here.

During the 1980s, there was some co-operation between all the riparian States, but these too proved ineffective. The factors were many, starting from the tensions between the riparian states due to PKK armed opposition to the Turkish government which was closely linked to the GAP in the South East of Turkey where the majority of the population is Kurdish.⁵ In addition, the eight year Iraq-Iran war made Iraq busy with the war, while Syria was a supporter of Iran. However, one cannot ignore the fact that all three riparian States agreed to a joint technical commission for the exchange of information in early 1982 despite the sporadic nature of the tri-partite meeting.

In 1982, Iraq and Turkey formed a Technical Committee which resulted in some exchange of technical information. This was considered a good step forward for the riparian States since they had taken steps to ensure that there was a dialogue between all

⁵ Ibid.

three of them. The most significant shift in approach came in 1980, when Iraq accepted Turkey's proposal to place an emphasis on the scientific and technical aspects of their differences, which led to the signing of a Joint Economic Protocol whereby a Joint Technical Committee was set up to consider the water issues. At its third annual meeting in 1983, Syria too joined and the Committee met sixteen times, including ministerial level meetings, until 1992.⁶

In 1987, Turkey, Syria and Iraq had another round of negotiation on a protocol for cooperation. According to the protocol, Turkey will leave 500 m³/s (16 billion m³/year) of the Euphrates to the downstream States. This was linked to security questions, indirectly including the Kurdish PKK issue. In the same year, Turkey and Syria signed the Protocol of Economic Cooperation, secured for Syria a minimum amount of flow in the Euphrates in exchange for Syria cooperation on border security.⁷ Kibaroglu states that the protocol was not devoted to water issues, and in any case was regarded as a temporary arrangement.⁸

In 1990 a conflict arose between Iraq and Turkey as a result of the negative impacts of the first phase of the filling of the Ataturk reservoir. The level of the river sank by one metre at the Syrian border, which resulted in an estimated loss of 15% of crops in Iraq.

⁶ Erdem, Mete., 2003. The Tigris-Euphrates Rivers Controversy And The Role Of International Law. *Ministry of Foreign Affairs of the Republic of Turkey*. Available at www.sam.gov.tr/perceptions/Volume8/March-May2003/MeteErdem.pdf, accessed 4 July 2008.

⁷ Based on that protocol, article 6 Provides that during the filling up period of the Ataturk Dam reservoir and until the final allocation of the waters of Euphrates among the three riparian countries, the Turkish Side undertakes to release a yearly average of more than 500 M3/Sec. five hundred cubic meter per second at the Turkish-Syrian borders and in cases where the monthly flow falls below the level of 500 M3/Sec, five hundred cubic meter per second, the Turkish Side agrees to make up the difference during the following month. Refer to Annex II of this thesis.

⁸ Kibaroglu A., 2002. Building A Regime for the Waters of the Euphrates-Tigris River Basin. London, Kluwer Law International, at pp. 249-250.

Later the same year, Iraq and Syria signed a treaty giving Syria 42% and Iraq 58% of the Euphrates flow regardless of the flow variation from year to year.⁹

In 1990 another conflict arose between Syria and Turkey. Syria began the construction of a dam on the Orontes, the only river flowing into the Turkish area of the Alexandrette. Turkey demanded that Syria control Kurdish activities, give up the area of the Alexandrette, and provide Turkey a definitive sharing of the Orontes.¹⁰

In 1991, when Gulf War I broke out, a conflict occurred between Iraq on one side and Turkey and Syria on the other side. Both Turkey and Syria had signed agreement in 1987 on the filling of the Ataturk Dam, allowing 500 m³/s water flow to Syria.¹¹ When the dam project completed in 1991, Turkey began the plan as agreed earlier and during January 1991 Turkey was filling the Ataturk dam and Syria continued using water normally but Iraq faced water shortages alone while at the same time Iraq was being bombed by the allies.

In 1992, another negotiation for cooperation took place between Turkey and Syria. Turkey asked that the protocol of 1987 be modified to include a reference to the link between Damascus and the Kurdish PKK. The Turkish minister of interior Ismet Sezgin asked the Syrian President Assad: “When I return to my country, will I be able to say

⁹ *Ratifying the Joint Minutes concerning the provisional division of the waters of the Euphrates River*. Law No. 14 of 1990, reprinted at <http://faolex.fao.org/docs/texts/irq15920.doc> [accessed 27 May 2010]. This Thesis, *Infra*, Annex II of.

¹⁰ Sahan, *Supra*, footnote 2.

¹¹ According to the the Official Gazette of Turkey dated 10 December 1987 that on 17 July 1987 it was agreed between the Republic of Turkey and the Arab Republic of Syria that: “During the filling up period of the Atatürk Dam resevoir and until the final allocation of the waters of Euphrates among the three riparian countries, the Turkish Side undertakes to release a yearly average of more than 500 m³/s at the Turkish-Syrian border and in cases where the monthly flow falls below the level of 500 m³/s, the Turkish Side agrees to make up the difference during the following month”. Water Issues between Turkey, Syria and Iraq, A study by the Turkish Ministry of Foreign Affairs, Department of Regional and Transboundary waters. *Ministry of Foreign Affairs of republic of Turkey*, at pp. 14-15. Available at <http://www.sam.gov.tr/perceptions/Volume1/June-August1996/WATERISSUESBETWEENTURKEYSYRIAANDIRAQ.pdf>, accessed 19 May 2010.

that the Kurdish problem is resolved?” “You will be able to say that there is a true cooperation in order to resolve this problem?”¹² This problem continued until the Turkish-Syrian protocol in 1998 as mentioned earlier.

In 1993, there was another conflict between Turkey, Syria and Iraq as a result of the negative impacts of filling of the Birecik dam, during which the water flow decreased to 300 m³/s. Turkey argued that the annual average remained 500 m³/s as agreed, but because Syria and Iraq have limited storage capacity, the timing was vital and impacted on the growing season.¹³

In 2008, Turkey, Syria and Iraq made a diplomatic initiative to establish a ‘Water Institute’¹⁴ that is hoped to develop cooperation among the countries and the exchange of developments in water technology.¹⁵ What is very clear is that the agreement has not yet been put into effect. However, what is not clear is the nature of the agreement between the riparian States and how it reflects the proper joint-use of the TERB. What is the extent of the legal implications of the prospective agreement? Does the prospective agreement meet the international standards of basin management provided under the customary international law and in light of the UNWC 1997? It is premature to reply to all those questions without having analysed the terms of the prospective

¹² Bulloch, John & Darwish, Adel., 1993. *Water wars: coming conflicts in the Middle East*. Gollancz, at p. 67.

¹³ Ibid.

¹⁴ Turkey, Syria and Iraq have recently decided to bury the hatchet over water issues and cooperate by establishing a water institute that will consist of 18 water experts from each country to work toward the solution of water-related problems among the three countries. Turkey adopts a fair-share model for the surface waters that leave its borders and suggests that the problems it has with Syria, Iraq, Iran, Bulgaria, Georgia and Greece over water management should be solved through bilateral talks. Ankara says it does not want third parties to get involved in the settlement of water issues. Citing drought, Iraq asks Turkey for more water. 2008. *Today's Zaman Newspaper*. Available at <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=143086> accessed 22 March 2009.

¹⁵ Yavuz, Ercan., 2008. Turkey, Iraq, Syria to Initiate Water Talks. *Today's Zaman Newspaper*, 12 March. Available at <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=136183>, accessed 30 July 2008.

agreement.¹⁶ However, a report states that, in his recent visit to Iraq, the Turkish President Abdullah Gul discussed Iraq's need for more water, for both agriculture and domestic consumption to help Iraq in its fights against severe drought. It was further stated that this visit showed the Turkish are willing to cooperate after both Iraq and Syria have been repeatedly asking Turkey to allow more water from the TERB to flow over the dams that constructed by Turkey for its economic objectives.¹⁷ This report indicates that there are signs of cooperation on the part of Turkey. Nevertheless, it is important to examine the above treaties, protocols and joint meetings, to identify the drawbacks of the abovementioned instruments and how virtually identify solutions for them, as follows.

There is no sole treaty on the use of the Euphrates River between all the three riparian States that can be considered as the main mechanism of regulating the River. Most of the above recorded protocols are between two of the three riparian States. Thus, one cannot argue that each of those treaties can be considered as a comprehensive treaty while the third riparian State is absent, since the latter's consent to the treaty is decisive. Therefore, signing a comprehensive treaty between the riparian States is a matter of necessity. This will be discussed further in Chapter Eight.

Most of the protocols, if not all, are made during the times of conflict whether internal, such as Turkish-PKK conflict, or international such as the Iraq-Iran war, Arab-Israeli conflicts, the Gulf Wars, and the Iraq-Syria conflict (non-water issues). Each of those

¹⁶ The researcher had tried his best to obtain some information from the Iraq's water ministry officials for the cause of the current thesis while attending the World Water Forum 5, held in Istanbul, Turkey, from March 16th to 22nd 2009. The researcher was told that all these information are neither subject to the access in public domains nor are they available for academicians and researchers to view. The reason was that they must be kept confidentially since most of them are connected to political deals.

¹⁷ Iraq, Turkey 'open new page' by discussing tough issues. 2009. *Earth Times*, 24 March. Available at <http://www.earthtimes.org/articles/show/261360,iraq-turkey-open-new-page-by-discussing-tough-issues--summary.html>, accessed 22 April 2009.

protocols covers other issues that were considered more important for national security to each of the riparian States. Therefore, the issues regarding the Euphrates River were of lower priority than the other issues. The Euphrates River was only remembered when the countries had particular interest in it or suffered water shortages. As a result, each riparian States had continued with their own national development projects, giving less significance to the rights of the other riparian States. However, in the twenty-first century, the nature of conflict has shifted to another direction, in which every State is attempting to develop so that they can benefit from globalisation and circumvent its challenges. Certainly water issues will account for the lion's-share of the challenges faced by States. Therefore, States' attitudes should be determined towards that direction, which can be again manifested in signing a formal and binding treaty.

During this time, Iraq has been busy with its internal and international conflicts that have caused Iraq to move backwards in terms of development. Meanwhile, Turkey has taken advantage of the situation, and continued to build its dams and hydropower projects to the point of no return but to complete the entire project. Subsequently, all future negotiations will be based on the existing facts and GAP infrastructure, creating more difficulties for Iraq to negotiate for the increase in water which is necessary for its own development. Thus, the principles of equitable utilisation and no significant harm will be harder to determine between the riparian States unless there is a binding treaty on the management of the TERB between the riparian States.

There is no agreement on the Tigris River per se, and each riparian State believes that it has the strongest argument.¹⁸ There are two possible reasons for a lack of formal agreement on the Tigris River. The first is that, to date, Syria has not substantially

¹⁸ Rogers, Peter & Lydon, Peter., 1997, *Water in the Arab World, Future Prospects*. (Arabic). Emirates Centre for Strategic Studies and Research, at p. 138.

benefited from the river even though it comprises part of its border. As for Iraq, the country was facing internal instability since the 2003 invasion as well as rapid changes of government and new State formation. In Turkey, most of the projects on the Tigris River were not primarily designed to substantially reduce the amount of water entering Iraq except for the recent Ilisu dam project, mentioned earlier. The second reason is that Turkey considers both the Tigris and Euphrates Rivers as one basin and in view of that, one treaty could cover both Rivers, as will be discussed later. It is stated that comparable data from Iraq shows that Iraq has a larger irrigable area than Syria. However, by means of the canals like Thartar Canal which link the Euphrates and the Tigris, Iraq has the option of using the waters of the Tigris for irrigation, which would otherwise flow unused, in place of water from the Euphrates. Consequently, a transfer of water from the Tigris to the Euphrates could alleviate the water shortage in the Euphrates. Furthermore, as is the case with Syria, most of the Iraq's land is low-lying and afflicted by deposits of gypsum and salt. This topography limits Iraq's ability to impound the waters of the Euphrates; consequently, they empty into the Gulf without being put to use.¹⁹

As far as the 2008 'Water Institute' is concerned, some reservations are worth mentioning. Iraq's latest position appears incongruent with the fact that the Iraqi government considers the equitable utilisation of Tigris and Euphrates River Basin as part of its sovereign rights, yet this will certainly be affected upon the completion of the Ilisu Dam Project. Although this reciprocal gesture is deemed as a positive sign, which may create room for future cooperation between the riparian States, it implies some

¹⁹ Turkey's Approach to Utilization of the Euphrates and Tigris Rivers. 2000. *The Free Library Website*. Available at <http://www.thefreelibrary.com/TURKEY'S+APPROACH+TO+UTILIZATION+OF+THE+EUPHRATE+S+AND+TIGRIS+RIVERS-a065653665>, accessed 17 March 2009.

political deal has been made. The danger with political deals is that they may only result in short-term or interest-based cooperation operating in the ‘game theory’ already discussed in Chapter Three. Whereas cooperation based on States’ observance of their international rights and obligations is more likely to be sustained in the long term. Moreover, it is mentioned that transfer of technical expertise from Turkey to the other riparian States. This statement suggests that the riparian States have taken negotiations back to square one by focusing on purely technical and technological issues. However, the doctrines of equitable utilisation and no significant harm are now part of customary international law, and it is about to become settled jurisprudence as has been discussed in Chapter Six. Despite this, there is no evidence of serious efforts on the part of Turkey to agree on identifying the legal positions of each riparian State.

When mentioning the exchange of expertise, accordingly it gives the impression that the only problem between the riparian States is the lack of technology and information.²⁰ While it is true that access to technology and information can enhance cooperation, one cannot ignore the necessity of building a legal and institutional regime through which to cooperate. Without such a regime all efforts to update technology and exchange information will be in vain. That is why it is essential to create a legal framework at the TERB level as the main mechanism to regulate the TERB management prior to any information exchange, technology transfer or other innovative plans. Hence, although the establishment of the ‘Water Institute’ is a great step forward, there appears little chance of success without consideration of the above.

²⁰ Ibid.

In order to examine the legal positions of the riparian States, it is necessary to analyse how claims and legal positions differ and how claims may be considered as legal positions.

6.3 States' Origins of Claims and Considerations

An abundance of articles over the last decade have discussed the considerations of the Turkish, Syrian and Iraqi governments towards the TERB. Some articles were analytical while others quoted from the official statements. They are briefly summarised below:

6.3.1 Considerations by the Turkish Government

The Turkish considerations can be described in three terms, they are; the 'unity' of the TERB, their sovereign rights, and interest exchange. All these three will be examined below:

As far as the term 'unity' is concerned, Turkey would prefer the Euphrates and the Tigris to be considered as single transboundary river basin where the waters should be allocated according to the objective needs.²¹ That is because of two reasons: firstly, the two Rivers join at Shatt al-Arab and empty into the Gulf as a single river.²² Secondly, even before they reach Shatt al-Arab, in the Midland, they are artificially joined through the Tharthar Canal so some of the Iraqi land irrigated from the Euphrates can be irrigated by means of water transferred from the Tigris. In hydrology, this claim by Turkey has a value, since a river basin refers to the entire geographical area drained by a

²¹ Kibaroglu, Aysegül., 2007. Socioeconomic development and benefit sharing in the Euphrates-Tigris River Basin. *Department of International Relations, Middle East Technical University, Ankara*. Available at <http://www.ipcri.org/watconf/papers/aysegul.pdf> accessed 11 March 2009. also Kibaroglu, Aysegul., 2008. The role of epistemic communities in offering new cooperation frameworks in the Tigris and Euphrates rivers System. *Journal of International Affairs*, Spring/Summer, 61(2). Available at <http://www.ir.metu.edu.tr/v2/faculty-members/aysegul-kibaroglu-assoc.-prof.-dr.html>, accessed 1 December 2008.

²² Figure 1, *Supra*, heading 2.2.

river and its tributaries; an area characterized by all runoff being conveyed to the same outlet.²³ Thus, Euphrates and Tigris can be considered as one since they merge in Shatt'1 Arab.

Although Turkey has the abovementioned consideration, yet in practise it was refereeing to each Tigris and Euphrates Rivers separately rather than making one tripartite agreement to the utilisation of this [single] Basin. This was clearly shown in the previous section that Turkey had most of negotiations and with Iraq and Syria each separately for the utilisation of the TERB, and both Iraq and Syria among themselves. Only recently the three riparian States had joint talks together. This practice by Turkey can be interpreted that although Turkey considers the TERB as one basin, it had accepted separate negotiations and signing separate protocols with Iraq and Syria on the utilisation of the TERB. Tomanbay suggested that this situation would be an easy way of sharing two river branches of one basin and with two different downstream States.²⁴

In the context of sovereign rights, Turkey has provided different interpretations of what is transboundary and what is international river. The interpretation removes the international aspect from the term transboundary to reduce the TERB to mere territorial water, with the corresponding State's sovereign rights over its territory. Thus, Turkey considers the Tigris and Euphrates Rivers as transboundary and not international rivers.²⁵ It is understood that Turkey considers transboundary rivers as rivers that are transcending the State's boundary with no international effect on it and the State enjoys full sovereign rights to utilise its territorial water. This can be witnessed from the

²³ Ask Oxford Dictionary Website. Available at http://www.askoxford.com/concise_oed/basin?view=uk, accessed 24 December 2009.

²⁴ Tomanbay, Mehmet., 2000. Turkey's Approach To Utilization Of The Euphrates And Tigris Rivers. *Arab Studies Quarterly*, at p. 1. Available at http://findarticles.com/p/articles/mi_m2501/is_2_22/ai_65653665/pg_1?tag=artBody:col1, accessed 22 June 2008.

²⁵ Ibid.

Turkish claim of sovereign rights over the two Rivers, when the Prime Minister Süleyman Demirel's response a press conference in 1992 over the watercourses saying:

“This is a matter of sovereignty. We have every right to anything we want... Water resources are Turkey's, and oil is theirs. Since we don't tell them ‘look, we have a right to half of your oil,’ they cannot lay claim to what's ours... These cross-border rivers are ours to the very point they cross the border”. (Süleyman Demirel)²⁶

According to Daoudy, Turkey still declining from considering the Euphrates and Tigris as international rivers, to which international customary principles, such as equitable and reasonable utilisation, apply. This was clearly evident in the debates at the Fifth World Water Forum held in Istanbul in March 2009.²⁷ Article 2 of the UNWC 1997 provides that “‘International watercourse’ means a watercourse, parts of which are situated in different States”, in which both the Tigris and Euphrates fall under such a definition. In this context it can be argued that Turkish consideration for the two Rivers are undermining the application of customary international law, although it has voted against the UNWC 1997.

Furthermore, Turkey chose this definition in order to enjoy more freedom on how to use the waters, and since the rivers have their source in Turkey, it maintains that it has rights over them. As a result of such an interpretation, as Kangarani argued, the Turkish government have played a game of delaying tactics so that most of GAP's infrastructure construction get near completion and to reach the point of no-return. This game can be

²⁶ Reed, Christopher., 2005. Paradise Lost: What should-or can-be done about the environmental crime of the century? *Harvard Magazine*. Available at <http://www.harvardmagazine.com/on-line/010538.html>, accessed 11 March 2008. *also* Allouche, Jeremy. 2005. Water Nationalism, An Explanation of the Past and Present Conflicts in Central Asia, the Middle East and the Indian Subcontinent, at p. 130. Available at <http://www.unige.ch/cyberdocuments/theses2005/AlloucheJ/these.pdf>, accessed 5 June 2008.

²⁷ Daoudy, Marwa. 2010. Syrian-Turkish Hydrodiplomacy. *Syria Today*, (61). Available at <http://www.syria-today.com/index.php/focus/5260-syrian-turkish-hydrodiplomacy>, accessed 18 May 2010

clearly seen from the statement “if the rivers were considered as international, a trilateral agreement would have had to be signed before GAP could have been implemented. For Turkey, conceding 500 m³/s (which is 15.8 billion m³/year) to the downstream States is seen as an act of good neighbourliness, not a legal obligation.”²⁸

According to Sahan, Turkey nevertheless respects certain aspects of international law such as not causing appreciable harm to ‘prior rights’ of utilisation, in other words Turkey will not cause too much harm to users who have already been using the water.²⁹ The term ‘too much harm’ could be interpreted as ‘significant harm’. In fact, it can be understood from the statements conveyed by some Turkish officials that this theory is favoured by Turkey, as Fathallah believes that if Turkey persists with this position, it will remain in endless dispute with Syria and Iraq over the Euphrates.³⁰

As far as the exchange of interests is concerned, Turkey proposed the principle of ‘comparative advantage’ which can be achieved through an agreement with Iraq and Syria based on technical considerations, water should be developed for the maximum benefit of all. According to this, Turkey uses the water to develop irrigation, thus covering the nutritional needs of the countries of the TERB as well as supplying them with hydro-electric power, though Iraq is capable to supply Turkey with oil, a vital

²⁸ Kangarani, Hannaneh M., 2005. Euphrates and Tigris watershed, Economic, Social and Institutional Aspects of Forest in an Integrated Watershed Management. *Forestry Outlook Study for West and Central Asia FOWECA/WP/1, Working paper*, at p. 30. Available at <http://ftp.fao.org/docrep/fao/011/ah821e/ah821e.pdf>, accessed 22 June 2008.

²⁹ Sahan, *Supra*, footnote 2.

³⁰ It is suggested that a majority, especially downstream riparian States, reject this theory for its narrowness and inefficiency in solving shared watercourse differences. Fathallah, Raed M., 1996. Water Disputes in the Middle East: an International Law Analysis of the Israel-Jordan Peace Accord. *Journal of Land Use and Environmental Law*, 12(1), at pp. 137-138. Available at http://www.un.org/Depts/dhl/me_water.htm, accessed March 2009.

resource for Turkey's economy.³¹ Hence, one could argue that Turkey is attempts to divert from the equitable utilisation and non-significant harm issues of the TERB to a mere goods exchange treaty. While it is true that oil is decisive for the economy of any State, it cannot be looked upon in the same way as water, when there are watercourse flows into Iraq by nature. The trade of oil for water could only be comparable if there was no natural water flow to Iraq, and Iraq needed to import water as any other commodity. Therefore, if the said Turkish proposal of 'comparative advantage' is agreed upon by the three riparian States, Turkey will be allowed to maximise the utilisation of its waters ignoring Iraq's need for water, and this will not secure a fairer water supply to Iraq when the petroleum productions in Iraq stops in the future. This will make Iraq falling at the mercy of Turkey directly and place Iraq in misery for domestic water and food demand. At that time there might not be much room for Iraq to rely on customary international law for acquiring enough water.

6.3.2 Considerations by the Syrian Government

As a weaker downstream State compared to Turkey, Syria has the following considerations towards the TERB:

Syria agrees with the Turkish considerations that the two Rivers compose one basin that crosses more than one State. However, it disagrees with the narrow transboundary interpretation by Turkey to the rivers. It argues that, since both rivers cross the boundary of different sovereign States both Rivers should be considered as international rivers,

³¹ Kibaroglu, Aysegul. Sustainable Development of Irrigation Systems in the Southeastern Anatolia Project (GAP) Region. Middle East Technical University. Available at <http://www.gap.metu.edu.tr/html/yayinlar/sustainabledevforgapAKibaroglu.pdf> accessed 22 March 2009.

regardless of the location of the States.³² This is based on what is meant by ‘international watercourse’ provide by Article 2 of the UNWC 1997. Therefore, the upper riparian State should not harm or affect in any way the flow or the quality of the shared waters in its use of an internationally shared river.³³

Moreover, Syria argues that the historical rights of Syria to use that water need to be protected since the people are living on the Euphrates River for thousands of years. If the water flow is substantially decreased to cause migration, then it will be the end of the civilisation in the area.³⁴ One may argue that this position by Syria does not mean that Syrians should be given priority over the Turkey in utilising the Euphrates River, otherwise, it will stand in contradiction to the Article 10 of UNWC 1997 which states that in the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.³⁵ Instead, Syria suggests that no water development projects should be undertaken without the prior consent of the other riparian countries. This suggestion has the validity of the fact that if there is no prior consent from the downstream States on the projects carried out by the upstream State, the downstream States will face water quality and quantity problems since the upstream State cannot be aware of the impact of the projects. Therefore, prior consents are significant for future inter-State relationships.

³² Al-Rabi'e, Sahib., 1999. *Crises over the Tigris and Euphrates River Basin, and Controversial Discrepancy between Water and Desertification*. (Arabic). Damascus, Hasanah House for Printing and Publications, at p. 104.

³³ Fathallah, Supra, footnote 30, at p. 136. Sahan, Supra, footnote 2, at p.23.

³⁴ Al-Makhadimi, Abdul Qadir., 1999. *Arab Water Security between Needs and Requirements*.(Arabic). Damascus, Dar Al-Fikir, at pp.122-125. Also Al-Rabi'e, Supra, footnote 32.

³⁵ In fact, equitable utilisation does not recognise the priority of use theory. It is argued that prior and existing uses should be given priority in establishing the equitable utilisation of the waters. The priority would constitute an assurance and protection of states' existing rights in allocations, thus encouraging them to invest in long-term development projects. Arguably, this concept would subvert the fundamental principle of equitable utilisation because it requires the examination of many factors together as a whole. As a result, it implicitly considers the element of stage of economic development. Fathallah, Supra, footnote 30.

Finally, Syria argues that when the TERB is considered as one basin, then Syria has the total downstream rights to the Euphrates, and Iraq the equivalent rights to the Tigris. This is not applicable claim, because Iraq cannot depend on the Tigris River alone to satisfy its water needs, as will be discussed in the Iraq's considerations below.

6.3.3 Considerations by the Iraqi Government

Similar to the Syrian claims, and other than claiming historical right to utilise the two Rivers in Iraq, it is not a big for Iraq whether the TERB is considered as one 'basin' or two. What is more important for Iraq is to look at the Rivers separately and independently considered and should be shared equitably between the riparian States. Iraq does not agree with Syrian position that Euphrates should be for Syria and Tigris for Iraq, but rather Iraq needs to receive water from both Rivers. Furthermore, only when the two rivers are considered separately, Iraq can then ensure that it receives sufficient water from Euphrates as well as from Tigris to meets its national needs.³⁶

It was stated that the focus of Iraq on the Euphrates River comes from the numerous problems linked to the utilisation of the Tigris, for example, the River traverses the north of Iraq, which is Kurdish territory. Should this area become more independent, it would mean that Baghdad would lose control over its water resources.³⁷ However, one cannot pretend that the Kurds will get an independent state especially in the post 2003 invasion, where the Kurds accepted remaining with the new federal State of Iraq but as an autonomous region.³⁸

³⁶ Al-Rabi'e, *Supra*, footnote 32, at p.107. also Al-Makhadimi, *Supra*, footnote 34.

³⁷ Al-Rabi'e, *Supra*, footnote 32, at p. 106.

³⁸ Article 117 of the Iraq new federal Constitution reads: "First: This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region." *Constitution of Federal Republic of Iraq*, 2005, reprinted at http://www.uniraq.org/documents/iraqi_constitution.pdf, [accessed 23 February 2010].also Kurdish

Another issue raised by Iraq is that the Tigris River has a higher salt content than the Euphrates that will make difficult for Iraq to use this water without mixing it with less salty water from the Euphrates especially for soils that are already naturally salty. Also, the majority of Iraqi irrigation schemes, as well as many villages, are situated along the Euphrates.³⁹

In short, it is difficult to identify the agreeable legal position between the riparian States due to their different approaches on defining the ‘basin’ and its two Rivers notwithstanding with the fact that Article 2 of UNWC 1997 provides lucid interpretation of which it reflects customary international law. Table 4 below shows the riparian States’ consisting and conflicting claims over the TERB.

Table 2. The similarity and differences of approaches by the riparian States

Considerations	Turkey	Syria	Iraq
One Basin	Yes	Yes	No
Two independent rivers	No	No	Yes
International character of the TERB	No	Yes	Yes
Historical Rights	No	Yes	Yes
Equitable Utilisation	No/Yes	Yes	Yes
Non-Significant Harm	Yes (appreciable harm)	Yes	Yes

In order to avoid potential conflicts, which come from the riparian States’ fundamental disagreements over the TERB, it is suggested that the riparian States have to deal with the problem on a regional scale, taking into account the needs and the capacities of all States. This goal would be best reached through establishing a treaty based body by the

leadership endorsed federalism and power sharing formulated and assented in Iraqi Constitution exactly for the lousy reason stated above. Hasan, Karim. 2009. Kurdistan Region and the Dangers of Remaining within Iraq. *Kurdish Aspect*. Available at <http://www.kurdishaspect.com/doc112209KH.html>, accessed 18 May 2010.

³⁹ Al-Rabi’e, *Supra*, footnote 32, at p. 105.

three riparian States that strengthens the legal and technical framework relying on the applications of customary international law, and governs the Joint Technical Committee to ensure the achievement of such a crucial task. This will be further discussed in Chapter Seven, but first the legal positions of the riparian States should be examined in order to establish the basis for the riparian States' legal rights.

Regarding the issue of how the legal positions of the riparian States are formed under international law it was mentioned in Chapter Four that international law is largely concerned with conflicting international claims as a matter of daily practice, which may enunciate a legal norm⁴⁰ that can materialise in a form of treaty which is able to establish new binding rules on all the States, regardless of the attitudes of any particular State as a matter of necessity.⁴¹ According to this argument, the legal status of transboundary water problems between the riparian States of TERB can have clearer stands for conflict resolutions. It is suggested that after the 1980s it was increasingly difficult to relegate economic, social, and environmental issues to the status of problems that can be solved without recourse to the international law. Unlike realist theorists, those taking a functional approach did not assume that these issues posed trivial problems for compliance.⁴² For that reason, reference to the application of international law becomes intrinsic fact for solving every inter-State problem through entering into treaties for conflict resolutions. For the TERB, such treaties can consolidate both States' rights and obligations towards utilising the TERB, and shrinks the chances of disagreements or taking different approaches. Since international law is largely concerned with States' rights and obligations, it will be much easier further to rely on

⁴⁰ Chapter Four, *Supra*, heading *International Custom*, at p. 105.

⁴¹ Charney, J. I., 1993. Universal International Law. *The American Journal of International Law*, 87(4), at p. 530.

⁴² Simmons, Beth A., 1998. Compliance with International Agreements. *Annual Reviews Political Sciences*, 1(75-93), at p. 79. Available at <http://arjournals.annualreviews.org/doi/abs/10.1146/annurev.polisci.1.1.75>, accessed 26 June 2007.

the UNWC 1997 in identifying the legal positions of the riparian States of the TERB. The reasons are; firstly, it represents general customary international law, and secondly, both Iraq and Syria are parties to UNWC 1997. Thirdly, although Turkey has voted against UNWC 1997 the main principles of UNWC 1997 still apply because its persistent objection has no value due to its inconsistent treaty and State practice.

From this perspective, water resources issues between the riparian States can only be solved when the riparian States of the TERB are ready to enter into a formal and legal binding treaty on the utilisation of the Basin. Another justification to rely on UNWC 1997 as the basis for the said treaty, Cohen believes that drafting treaties depend upon an official body of law in order to survive political disagreement between the riparian states.⁴³ Therefore, the UNWC 1997 should be considered as the main source of law forming the legal position of the riparian States. In the following section, the substantive norms and procedural rules provided by the UNWC 1997 will be examined with respect to the legal positions of the parties which are namely equitable utilisation, no significant harm, and the procedural rules.

a. Recalling the principle of Equitable Utilisation

As discussed in Chapter Five, Article 5 of the UNWC 1997 sets out the principle of equitable utilisation as not only a right to an equitable allocation but also as a positive duty to reasonably participate in the protection and development of the watercourse.⁴⁴ Thus, Article 5 contains the fundamental rights and obligations of the riparian States by utilising and developing the watercourse in a manner that will result in optimal utilisation of the watercourse consistent with its protection. Also, the States should

⁴³ Fathallah, *Supra*, footnote 30, at p.137.

⁴⁴ Chapter Five, *Supra*, heading 5.3.2 Substantive Norm, at p. 130.

participate and cooperate in an equitable manner, in the use, development, and protection of the watercourse.

It was found in Chapter Five that this Article represents customary international law and therefore should be binding on all the riparian States. Another important aspect of the Article is that it requires the consideration of equity and reasonableness in the uses of any particular watercourse and a weight given to each factor, depending on the nature of the specific watercourse together as a whole, and no priority should be given to any particular use. Thus, Article 10 specifies that “in the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.” Further, Article 10 adds that in case of conflict between uses of international watercourse, resolutions should be resolved in accordance with Article 5, equitable and reasonable utilisation, and Article 7, no appreciable harm with “special regard being given to the requirements of vital human needs.” As to the ‘priority of use’ case, there is no evidence that both Iraq and Syria have claimed it.

As far as Article 5 is concerned, Turkey does not recognise the Article as legitimate, not because of its inconsistency with international law, but because of the wording of the Article itself. This was clearly seen when the Turkish delegation stated that “...Concerning article 5, the word [“interests”] could give rise to various interpretations and was too vague, in view of the importance of the article....”⁴⁵ This statement suggests that Turkey cannot comply with a norm that is vague and therefore reserves the right to reject it *ab initio* before the issue of compliance comes about. However, the word ‘interests’ does not seem to be problematic for Turkey in Article 5 of Protocol No. 1 of the TFNRIT 1946 which reads: “Turkey shall keep Iraq informed of her plans for the

⁴⁵ Statement by Mr.. Iskit, *The Official Record of the UNGA*. 1997. UNGA Sixth Committee, 62nd meeting, at p. 12. Available at www.un.org/ga/, accessed 14 August 2007.

construction of conservation works on either of the two rivers or their tributaries, in order that these works may as far as possible, be adapted, by common agreement, to the interests of both Iraq and Turkey.”⁴⁶

Although, the abovementioned two Articles are different in application, the spirit behind the word ‘interests’ in both Articles is encouraging States to cooperate. Based on the debate made by the Turkish delegation it could be argued that Turkey is more likely to recognise the Article if the wording of the article is made clearer. Besides, in 1990s Turkey has proposed to both Syria and Iraq the ‘Three Staged-Plan for Optimum, Equitable and Reasonable Utilization of the Transboundary Watercourses of the Tigris-Euphrates Basin’,⁴⁷ as will be further discussed in Chapter Seven. Therefore, when Iraq, Syria and Turkey are willing to sign a binding treaty to manage the TERB, they can reconsider the wording of Article 5, and draft it in such a way that all the riparian States are happy with it. Furthermore, since both Iraq and Syria are parties to the UNWC 1997 Convention, it can be concluded that the first fundamental legal right of the riparian States is to utilise the water from both the Tigris and Euphrates Rivers equitably considering all the social, economical and vital human need factors.

b. Recalling the no Significant Harm principle

In expanding the substantive protection of the usage of international rivers, Article 7 embodies the principle of international law that requires riparian States to exercise due diligence to prevent causing significant harm to co-riparian States. Turkey does not like the language used in Article 7 not because of the principle itself, but rather because of the mandatory nature of language is used in the Article.⁴⁸ That is normal for Turkey, as

⁴⁶ Treaty of Friendship and Neighbourly Relations between Iraq and Turkey, *Supra*, footnote 1.

⁴⁷ Kibaroglu, *Supra*, footnote 21b. *also* Kibaroglu, *Supra*, footnote 8, at pp. 250-252.

⁴⁸ The Official Record of the UNGA, Sixth Committee, *Supra*, footnote 45, at p. 3.

the strongest riparian State, to dislike mandatory language as it may affect its interests in the TERB. However, when a particular norm under international law is widely agreed to reflect customary international law, the dissenting State cannot easily ignore it. Furthermore, Turkey has been shown to have failed in its attempt to become a persistent objector. It does not seem appropriate for a State to agree with only the first half of a particular norm while ignoring the second half, especially when Turkey expressed its interest not to cause too much harm to the downstream States, as mentioned earlier. Thus, it can be argued that Turkey agrees in principle with the article, but disagrees with how it should be applied, and it brings more relief for both Syria and Iraq to negotiate further with Turkey on these grounds.

c. Procedural obligations

Exchange of information composes an important part of procedural obligations. It can be understood from the Turkish delegation's statement, that Turkey does not oppose Article 11 which provides for information concerning planned measures. The Article states "Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse." Also Article 5 of Protocol No.1 in the TFNRIT 1946 reads "Turkey shall keep Iraq informed of her plans for the construction of conservation works on either of the two rivers or their tributaries, in order that these works may as far as possible, be adapted, by common agreement, to the interests of both Iraq and Turkey."⁴⁹ The latter article is, in fact, more illuminative than the former, because the former merely provides for the general application of the article. However, the latter article brings two conditions for the sake of the article; they are common agreement, and interests of both Iraq and Turkey. Hence, as far as the Turkish-Iraqi relationships is

⁴⁹ Treaty of Friendship and Neighbourly Relations between Iraq and Turkey, *Supra*, footnote 1.

concerned, if Turkey intends to comply with this article, then its objection to Article 12 of the UNWC 1997 should be an error since the UNWC 1997 article calls for protecting the common interests of the parties through avoiding significant adverse effect upon other watercourse States. The article reads: “Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.”⁵⁰

Such inconsistency suggests two possibilities. The first is that, at the time of the processing the ILC Draft Articles, the Turkish delegation was not aware of the 1946 treaty between Iraq and Turkey. The second scenario is that Turkey chose to ignore its previous treaty with Iraq. Since the first scenario is incongruous with the character of the Turkish delegation, the second scenario seems more likely. The GAP was under construction for about two decades at the time of voting for the UNWC 1997, and of course, Turkey would not vote for a convention that is not in accordance with its interests. Therefore, Turkey objected Article 12 and the rest of articles under Part III of UNWC 1997.

Such an error suggests that Turkey may not object any form that regulate notifications of planned measures and exchange of information that might be necessary for the riparian States, notwithstanding the fact that Turkey is at the point of no return with the GAP. However, international law is concerned with protecting all the States equally through both conceptualising and realising the rights and obligations of States. In short,

⁵⁰ *Law of the non-navigational uses of international watercourses*, 1971, U.N.G.A. Res.2669 (xxv), A/Cn.4/244/Rev.1, reprinted at http://untreaty.un.org/ilc/summaries/8_3.htm [accessed 10 May 2010]

like both Iraq and Syria, Turkey is also bound by this obligation especially if it is made more precise to protect the interests of Iraq and Syria accordingly.

d. Dispute settlements

Article 33 paragraph (1) of the UNWC 1997 provides that in the event of a dispute between two or more parties concerning the interpretation or application of the present Convention, the parties concerned shall, in the absence of an applicable agreement between them, seek a settlement of the dispute by peaceful means in accordance with the provisions of UNWC 1997. Moreover, Article 9 provides that conflicts are to be prevented by exchanging data and information, communication and consultation and, if parties fail to achieve the settlement of disputes by any of these means, then a State unilaterally has recourse to an impartial fact-finding commission,⁵¹ Article 33 requires the States to declare upon becoming parties to the UNWC 1997 that they accept as compulsory the submission of disputes to the ICJ or to arbitration in accordance with procedures set out in the Annex to UNWC 1997.⁵²

Apart from Article 33 of the UNWC 1997, Turkey does not seem to have difficulties in dispute settlement issues even if it is compulsory under both the UN Charter and the 1946 Treaty, in which Article 5 provides that the High Contracting Parties undertake, in conformity with the provisions of Article 33 of the UN Charter, to settle by peaceful means all disputes which may arise between them and to refer to the UNSC, in

⁵¹ Ibid.

⁵² McCaffrey, Steven C., 2001. *The Law Of International Watercourses: Non-Navigational Uses*. Oxford University Press, at p. 261.

conformity with the provisions of Article 37 of the Charter, any disputes which they may fail to settle by these means.⁵³

Article 33 of the UN Charter states: (1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. (2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means. At the same time, Article 37 of the UN Charter reads: (1) Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council. (2) If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

The above procedures are not binding on the parties unless the parties agree otherwise, and Turkey as a powerful State does not like decisions of a binding nature. However, Article 36 (3) of the UN Charter reads “In making recommendations under this Article the UNSC should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”

However, after applying Article 5 of the TFNRIT 1946, Iraq can depend on this on this Article to bring the matter to the ICJ through support of the UNSC to precede its future

⁵³ Treaty of Friendship and Neighbourly Relations between Iraq and Turkey, *Supra*, footnote 1.

disputes with Turkey. While it is often argued that the ability of international law and the ICJ to bind State actors is weak, and that the dualist nature of many legal regimes limits the enforcement of international norms, records show that the ICJ actually has a great record of securing compliance, despite some notable failures.⁵⁴ Besides that, the ICJ decisions are binding in nature which removes another excuse for Turkey to escape from its obligation. In summary, like Iraq and Syria, it can be argued that Turkey does not object the dispute settlement if a consensus is reached on how to establish mechanisms to solve disputes. This matter is related to States' compliance of international obligation as will be discussed below.

6.4 State's Compliance of international obligation

In practice, agreements among asymmetrically powerful actors are rarely perfectly voluntary, and the decision to conform to prescribed behaviour might rest on an amalgam of State obligation and felt coercion.⁵⁵ Such circumstances make it more complex to demand a particular State complies with its international obligation. Thus, it will be difficult to examine the actual legal positions of States towards a particular issue if one or more States do not comply with international law.

As to the definition of compliance, it encompasses those State activities aimed to fulfil the purpose and objectives of the treaty regime. Compliance is an integral component of implementation and refers to a State's behaviour in terms of its conformity with treaty commitments.⁵⁶ There is another definition that distinguishes compliance from the above definition and treaty implementation. It states that behaviour of a given subject

⁵⁴ Schulte, Constanze., 2004. *Compliance with Decisions of the International Court of Justice*. New York Oxford University Press., at pp. 282-285.

⁵⁵ Simmons, *Supra*, footnote 42, at p. 80.

⁵⁶ Wouters, Patricia., Geneva Strategy and Framework for Monitoring Compliance with Agreements on Transboundary Waters. in Bogdanovic, Slavko. (Ed), *Legal Aspects of Sustainable Water Resources Management Proceedings*, 2002, at p 103.

may still be in compliance with prescribed behaviour up until the actual behaviour departs significantly from prescribed behaviour, at which point it is regarded as noncompliance or violation.⁵⁷ Since part of this thesis examines the treaty practice between the riparian States of the TERB, the researcher subscribes to the first definition of compliance.

There are two levels of compliance, first order and second order. The first order refers to compliance with standing, substantive rules often embodied in treaty arrangements⁵⁸ or in conventions like the principles of equitable utilisation and no significant harm embedded in Articles 5 and 7 of the UNWC 1997. It is difficult to establish an underlying rate of compliance since it is unclear how to measure the rate. Therefore, researchers looking for the same set of behaviours disagree over whether law, rules, and agreements effectively govern most foreign policy actions, or whether such considerations have little effect on State behaviour. Not only that, some States may become a non-compliance party to a treaty or vote against a particular convention for the excuse that, according to Wouters, there may be ambiguity and indeterminacy in the treaty language, limitations on the capacity of the parties to carry out their undertakings, and the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.⁵⁹ The reasons for such ambiguity is that all the sovereign States have the inherent right to interpret the law in accordance with their understanding and interests, they can attempt to change it, and they can choose to ignore it so long as they are prepared to accept the very real political, economic, and even military consequences

⁵⁷ Simmons, *Supra*, footnote 42, pp. 77-79.

⁵⁸ *Ibid.*, p. 77.

⁵⁹ Wouters, *Supra*, footnote 56, at p.104.

that may result.⁶⁰ The best example is the statement made by the Turkish delegation regarding Article 7 of the UNWC 1997.

“...As for the text of article 7, despite the improvements made by the Chairman, the expression “duly taking account” still lacked precision, particularly concerning the relative priority of the principles stated in articles 5 and 7. Consequently, his delegation could not accept the cluster of Articles in question and requested that the matter should be put to the vote.”⁶¹

The second order compliance, however, is compliance with the authoritative decision of a third party, such as a panel of the World Trade Organization, the United Nations Human Rights Committee, or the International Court of Justice.⁶²

When talking about compliance under international law, to realists, the decentralised nature of the international legal system is its prime defect. For them, international agreements lack restraining power, especially since governments generally retain the right to interpret and apply the provisions of international agreements selectively. Realists view the activities of major powers and the pursuit of important interests as highly unlikely to be constrained by legal authority or prior agreement. For that reason, they typically assume that international law is merely an epiphenomenon of interests or is only made effective through the balance of power. This position makes realists especially sceptical about the rule of law and legal processes in international relations.

⁶⁰ Casey, Lee A., & Rivkin, David B., 2006. International Law and the Nation-State at the U.N: A Guide for U.S. Policymakers. *The Heritage Foundation Leadership for America*. Available at http://www.heritage.org/Research/WorldwideFreedom/bg1961.cfm#_ftnref4 accessed 14 July 2008.

⁶¹ The Official Record of the UNGA, Sixth Committee, *Supra*, footnote 45, at pp.10-11.

⁶² Simmons, *Supra*, footnote 42, at p. 79.

6.5 Conclusion

This chapter initially discussed the past and present treaties and protocols between the riparian States of the TERB from the 1946 to 2008. It argues that there is no sole treaty on the uses of both the Tigris and Euphrates Rivers between all the three riparian States to be considered as the main mechanism of regulating the entire Basin. Most of the above recorded protocols are between only two of the three riparian States, hence it is emphasised that those treaties cannot be considered as comprehensive while the third riparian State is absent, since the latter's consent to the treaty is decisive. This highlights the necessity for the signing of a comprehensive treaty between the riparian States. Furthermore, most of the protocols, if not all, are made during the times of conflict and which therefore focus on other issues that were considered more important for the national security to each of the riparian State. Therefore, the Euphrates River issues were seen as of a lower priority than the other issues. However, sooner or later water issues will certainly become the major challenge faced by States and require a change in attitude towards the direction of accepting joint use of the TERB, which can be again materialised in signing a formal and binding treaty.

The Chapter has further examined the riparian States' claims *vis-a-vis* their legal positions on the TERB. It was suggested that claims come from rights that can guarantee entitlements, which is dependent on a State's consideration or perspective on a particular matter. Thus, States can have different considerations on a matter without reflecting the realities that could leave room for conflict.

When discussing the Turkish view that the TERB comprises one basin, it was argued that the fact that each River crosses the territory of two different States notwithstanding the fact that they merge again in one State may counter this consideration although from

strict hydrological definition it is considered as one basin. The reason is that the dependence on the rivers will be different from one State to another based on different political, social and economical factors of each States. Another factor is that the Turkish contribution to the Euphrates is about 89%, while the other 11% comes from Syria, which means that both Turkey and Syria contribute to the water entering Iraq. Finally, although the Tigris forms part of the border to Syria, no material advantages from the Tigris River are received by Syria. In other words, Iraq is the main beneficial downstream State of the Tigris River after Turkey.

Next, unlike Iraq and Syria, the Turkish approach to deem the TERB as a transboundary watercourse with no international character seems not only to contradict the definition and modern understanding of what transboundary river basin means, but also undermines the rights of the other sovereign States which is not allowed by international law. Unlike Turkey, both Syria and Iraq claim historical rights over the TERB are similar. However, Syria argues that the Euphrates River should be utilised by Syria after Turkey and Tigris should be for Iraq. So, they believe that the two rivers should be considered differently and for two different downstream States. As to the case of Iraq, it argues that no matter how the two Rivers are considered, Iraq needs water from both the Rivers to survive. Also, Iraq argues that the imminent creation of an independent Kurdish State would necessitate a claim for more water does not bear out; since it now appears that the Kurds are content to remain under Iraq as an autonomous state. Thus, it was suggested that in order to avoid potential conflicts, which come from the riparian States fundamental incongruities over the TERB, it is suggested that the riparian States have to deal with the problem on a regional scale, taking into account the needs and the capacities of all States.

As to the principles of the equitable utilisation, it was argued that since both Iraq and Syria are the parties of the UNWC 1997 Convention, it can be concluded that the first fundamental legal right of the riparian States is to utilise the water from both the Tigris and Euphrates Rivers equitably considering all the social, economical and vital human need factors. It is nonetheless argued that Turkey in principle agrees with the article itself, but disagrees with how the compensation should be made, and this allows for both Syria and Iraq to negotiate further with Turkey on this ground. Next, as to the exchange of information, international law is concerned with protecting all the States equally through both conceptualising and realising the rights and obligations of States. Thus, like both Iraq and Syria, Turkey should be bound by this obligation especially if it is made more precise to protect the interests of Iraq and Syria accordingly. Finally, like Iraq and Syria, Turkey does not object the dispute settlement if a consensus agreement is reached how to establish mechanisms to solve disputes, which may mean that Turkey implicitly agrees with the UNWC 1997.

Finally, the chapter discussed States' compliance with international obligation. It has been concluded that international legal agreements are made to solve common problems between States that have difficulty solving them unilaterally or through political means alone. The initial assumption of the functionalist approach is not that States cynically manipulate their legal environment, but that they engineer it in sincere efforts to affect an otherwise sub-optimal outcome. Thus, it is imperative for the riparian States of TERB to consider the creation of a legal and binding treaty to govern the TERB regionally, and that treaty should be comprehensive enough to meet all the legal and institutional needs of the riparian States of TERB. This will lead to creating a new phase of transboundary water management of TERB, to which Chapter Seven is dedicated for.

CHAPTER SEVEN

NEW PHASE OF TRANSBOUNDARY WATER MANAGEMENT OF 'TERB'

7.1 Introduction

The previous Chapters have identified the material disadvantages faced by Iraq because of the water usage by upstream riparian States.¹ The status of international relations with reference to the role of international law has been discussed,² and the applicable international law,³ including the UNWC 1997 were examined.⁴ Upon examining subjects relevant to the TERB, the legal positions of the riparian States were analysed⁵ in order to establish a new institutional mechanism for managing the TERB governed by the international law. In other words, to use international law to establish a particular, formal and explicit agreement between the riparian States, which is binding and accordingly enforceable; and, furthermore, to recommend how the agreement can be achieved through implementing the proposed institutional mechanism between the riparian States.

The current complications faced by the riparian States in managing the TERB can be represented by their failure over the past three decades to reach to a formal, legal and binding agreement capable of controlling the water management of the TERB. As a result, no mechanisms to enforce an agreement or to settle their current and future disputes exist. Furthermore, the role of international law, represented in international general agreements, customary international law and other resources, is to facilitate the

¹ Chapter Two.

² Chapter Three.

³ Chapter Four.

⁴ Chapter Five.

⁵ Chapter Six.

riparian States to reach an explicit agreement by offering them the general principles, rules and agreements for water allocation.

Secondly, as McCaffrey argues, international law has developed in such a way as to ensure equitable resolutions of international water disputes under the theory of limited territorial sovereignty.⁶ However, since customary international law is in progressive development, it may be realistic to argue that currently international law is not adequately equipped to impose solutions to all conflicts, such as in circumstances of power asymmetry and the practice of hegemony, as has been mentioned earlier in the thesis. In the TERB riparian States have failed to reach an agreement on the use of the TERB partly or entirely as a result of such imbalances. Not only does such failure have serious, far-reaching repercussions for the peace and prosperity of the riparian States but it may also threaten regional stability in the Middle East. Needless to mention the emerging environmental, ecological or water security issues to this matter.⁷

Although it is not yet too late to resort to the application of international law, it will be too late for States to think about cooperation on the brink of real conflict as a result of ignoring the worth and role of international law. Based on that notion, it is never too early to create a regulatory instrument model for the riparian States of the TERB not only to avoid future conflicts, but to facilitate negotiation processes and strengthen the tripartite relationships in order to achieve cooperation over the management of the TERB. In this chapter, it is important to consider why other proposals by the riparian

⁶ McCaffrey, Steven C., 2001. *The Law Of International Watercourses: Non-Navigational Uses*. Oxford University Press, at pp. 16-20.

⁷ Erdem, Mete., 2003. The Tigris-Euphrates Rivers Controversy And The Role Of International Law. Ministry of Foreign Affairs of the Republic of Turkey. Available at www.sam.gov.tr/perceptions/Volume8/March-May2003/MeteErdem.pdf, accessed 4 July 2008.

States to address the water issues of the TERB were not successful in the past. The most important proposal is the Three-Staged Plan by Turkey which will be discussed below.

Three decades of negotiation is far long enough time to end a dispute if the parties are willing to solve it. However, a distinct characteristic of the conflicts over the TERB is a constant lack of progress.⁸ Moreover, the last period of negotiations, which discontinued several years ago, showed the absence of a collective political will to cooperate towards an equitable solution.⁹

The previous negotiations involved various attempts to explore the political, legal and technical aspects of the issues and to develop corresponding approaches to settling their differences, all of which failed to reach a consensus on the legal concepts and criteria to follow. Instead, the parties chose to leave the legal issues unsettled, and turn to hydro-politics with the hope of attaining some degree of agreement. When Syria and Iraq demanded for the formulation of urgent 'sharing arrangements' depending on the criteria that they put forward,¹⁰ Turkey proposed the 'Three-staged Technical Plan for Optimum, Equitable and Reasonable Utilisation of the Transboundary Watercourses of the Euphrates and Tigris Basin' (hereinafter the 'Plan') at the Fourth Meeting of the Joint Technical Committee between 5 and 8 November 1984. It is said that Turkey restated this Plan at the tripartite meeting in the Ministerial Meeting on 26 June 1990 and during the follow-up bilateral talks with Syria and Iraq in 1993.¹¹ In spite of both Syria's and Iraq's reluctance to consider this technical approach, the Three-Staged Plan

⁸ Ibid.

⁹ Ibid.

¹⁰ Kibarodlu, Aysegül., 2007. Socioeconomic development and benefit sharing in the Euphrates-Tigris River Basin. *Department of International Relations, Middle East Technical University, Ankara*. Available at <http://www.ipcri.org/watconf/papers/aysegul.pdf>, accessed 11 March 2009. also Ayşegül Kibaroglu, *Building a Regime for the Waters of the Euphrates-Tigris River Basin*. London, The Hague, Kluwer Academic Publishers, 2002), p. 252.

¹¹ Erdem, *Supra*, footnote 7.

of identifying the criteria for equitable and reasonable utilisation has its merits in the modern development of the TERB.

The creators of the Plan claimed that only by quantifying needs will a more manageable method of sharing water be agreed. In the Plan, Turkey called for the establishment of a joint body for collecting, handling and exchanging data regarding water resources and land use, so that annual and seasonal variations could be incorporated into the estimations made to determine water allocations. In such a development, data sharing would facilitate the negotiation process and promote the creation of many cooperative structures. Hence, data gathering through joint efforts would enable the riparian States to become accustomed to cooperation and to proceed with discussions over water allocations. Along with reaching a set of agreed criteria in data-sharing, negotiations could move on to issues of coordination of projects and the creation of joint projects. Although Kibaroglu states that the plan is evolutionary and forward-looking in nature, since it could be revised according to prevailing conditions and developed further through an interdisciplinary dialogue with the inclusion of the relevant stakeholders, the Plan was coolly received by Iraq and Syria because they were afraid their sovereign rights will be affected.¹² Thus, they became reluctant to accept the Plan for its criteria at that time.¹³

Both Iraq and Syria considered that the joint studies for optimal utilisation of water and land resources are an infringement on their sovereignty because, later, Turkey will be in the position to establish that certain agricultural practices in Iraq and Syria are less efficient than those in Turkey, and therefore their water needs less justifiable.¹⁴ It is not

¹² Kibaroglu, *Supra*, footnote 10b, at p. 256.

¹³ Erdem, *Supra*, footnote 7.

¹⁴ Kibaroglu, *Supra*, footnote 10b, at pp. 256-257.

the main task of this chapter to discuss and analyse the potential positive and negative aspects of the Plan, since both Iraq and Syria rejected it, and now are both parties to the UNWC 1997 which provides for equitable utilisation. The task of this Chapter is rather to propose a new legal and institutional framework for managing the TERB more efficiently by the riparian States. This Chapter recommends for the establishment of a special commission, which will be discussed in details in the next section, agreed and sponsored by the three riparian States, but has an independent nature, in terms of management and decision making perspective, from any of the riparian States. However, before discussing the nature of the commission, it is important to consider that although there were particular agreements made and concluded between the riparian States, but they were not successful in terms of resolving the disputes taking place between them. This could be due to failure to make a multilateral agreement between the riparian States. It is unclear whether this happened due to the difficulty of negotiation increasing when number of parties increase, or due to severe lack of understanding and political relationships.

In fact, perfect formation of a treaty requires good environment. The researcher admitted that there are obstacles represented in political aspects and deals resulting in concluding non-explicit agreements that can lead to conflict over water resources.

Work by Just and Netanyahu led the researcher to review the standard approaches to the allocation of rights in water disputes, as well as the usual obstacles that prevent States from reaching mutually beneficial agreements. Just and Netanyahu considered that the doctrines and agreements for water apportionment among countries are based on six main apportionment theories; they are: prior appropriation, the Harmon Doctrine, riparian rights, mutual development theory, the linkage principle, and the Helinski

Rules, on which the work of ILC is based.¹⁵ Also, the goals of formal contracts and apportionment theories include equitable and efficient allocation of water through river management. However, Just and Netanyahu believe there are obstacles to the formation of sustainable treaties that assure proper allocation and are beneficial to all participants.¹⁶ These obstacles include the following.

Firstly, there is an issue of asymmetric information. The countries involved in disputes usually have asymmetric access to necessary information or data because of differing ability to process data. Information available to one country but unavailable to others gives the former a better position in negotiating with other riparian countries. In other words, one country can use the information or data to formulate a strategic advantage over another country.¹⁷

Secondly, enforcement limitation is another problem. An agreement requires enforcement in order for it to be successful, but this requires monitoring which has three major limitations: high costs, technical feasibility or the lack thereof, and sovereignty. International legal rules do not have effective enforcement power, and only offer guidelines for water allocation. A nation may decide not to expose itself to the international court or accept a third party ruling.¹⁸

Thirdly, issues pertaining to sovereignty will never end. Typically, it is in a country's best interest to protect its absolute sovereignty and a decision that decreases the right of a country to have control over a river basin is not going to be accepted.¹⁹ As a result,

¹⁵ Richard E. Just & Netanyahu, Sinaia., 1998. *Conflict and cooperation on trans-boundary water resources*. Kluwer Academic Publishers, at pp. 9-14.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

such circumstances lead to conflicting national and international interests. While negotiating a basin related treaty, a country often faces competing pressures from domestic regions and neighbouring countries. Domestic interest groups often oppose the international position and complicate the negotiations.²⁰

Fourthly, asymmetric country characteristics affect the ability of a country to bargain for its share of water in the river basin, since there are differences in the national per capita income, natural resources, military power, etc. among states.²¹

Finally, upstream and downstream considerations, such as the geographical location of a State are decisive for State's power and holding key control and solution. The State that controls the source of the water potentially holds a powerful position in the negotiation process. For example, Syria has a dominant position over Jordan as it controls four major sources of the Yarmouk River that flows into Jordan.²² The same case applies to the current thesis for Turkey since it controls the sources of both Tigris and Euphrates Rivers and has developed major projects on both rivers, as indicated earlier in Chapter Three.

7.2 Tigris and Euphrates Rivers Commission

Today, it is widely accepted that institutions play a key role in promoting international cooperation and thus preventing and mitigating conflict. For example, it has been found that the institutional capacity, defined as the existence or absence of a water commission or treaty, within a basin appears to be a very good indicator of water conflict and

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

cooperation. It is seen that basins without treaties were significantly more prone to conflict than basins with treaties.²³

It is undoubtedly the case that the help of a third party is often necessary in international disputes. Parties to a dispute may be unable to communicate effectively or, in a desire to avoid looking weak, may wish to make settlement offers through a third party. Conversely, proposals may be easier to accept if they are made by third parties. The disputants may sometimes be under international pressure to accept third party assistance. Whatever the reasons might be, parties do sometimes turn to third parties to help them end their conflict.²⁴ The reason for referring to a third party is their independence and impartiality. Although the concepts of independence and impartiality are closely linked, both independence and impartiality have their own specific meaning and requirements. Independence literally means free from undue bias or preconceived opinions.²⁵ In practice independence refers to a party's relationship to others and involves both individual and institutional relationships. Impartiality, on the other hand, is a principle of justice, which holds that decisions should be based on objective criteria, rather than on the basis of bias, prejudice, or preferring the benefit to one person over another for improper reasons.²⁶

²³ Nilsson, Susanna & Langaas, Sindre., 2006. International River Basin Management under the EU Water Framework Directive: An Assessment of Cooperation and Water Quality in the Baltic Sea Drainage Basin. *Royal Swedish Academy of Sciences 2006 Ambio*, 35(6), at p. 307. Available at <http://ambio.allenpress.com/archive/0044-7447/35/6/pdf/i0044-7447-35-6-304.pdf>, accessed 11 March 2009.

²⁴ James D. Smith., 1994. Mediator Impartiality: Banishing the Chimera. *Journal of Peace Research*, 31(4), at pp. 445-450. Available at <http://jpr.sagepub.com/cgi/content/abstract/31/4/445>, accessed 12 March 2009.

²⁵ *Collins English Dictionary*. 1998. Glasgow, Harper Collins, at p. 502.

²⁶ Brian M. Barry., 1995. *Justice as impartiality*. Oxford University Press, at pp. 5-14. also *Holdings: Webster's Quotations, Facts and Phrases*. 2008. Icon Group International, Inc., at p. 510. also Philosophical concepts of impartiality. *Nation master Encyclopaedia*. Available at <http://www.statemaster.com/encyclopedia/Impartiality>, accessed 13 March 2009.

However, as to the role of the third party in the Nile Basin Initiative, Foulds argued that the involvement of third parties, such as the World Bank, the United States, and Canada, in environmental conflicts further complicates the issues of political, social, and economic interests, and hinders regional cooperation. Furthermore, autocratic government control over civil society prevents the emergence of vibrant NGOs with respect to economic projects and political programs. Consequently, both domestic and international NGOs become not prevalent, while the influence of third parties strengthens. The role of third parties, such as the World Bank, continues to create a schism between the project planners and those individuals directly implicated by its construction or implementation. Therefore, due to the involvement of third parties, especially when the NGOs become absent, and the aspects of Nile Basin politics, the Nile Basin Initiative will fail to achieve the intricate goals of conflict resolution and regional cooperation.²⁷

Based on the above notion, the researcher emphasises that the riparian States need to agree on allowing this commission some degree of independence, although not a third party in decision making process in managing the TERB. This commission can be named as Tigris and Euphrates Rivers Commission (hereinafter the Commission) to carry out both technical and legal matters related to the management of the TERB. The advantages of initiating this Commission are immense, such as avoiding hegemony problems. When the parties are willing to jointly establish this Commission, it means that they are willing to solve their interstate water problems. As a result, a fairer decision and better governance will become the custom for the riparian States. Another

²⁷ Foulds, Kimberly E., 2002. The Nile Basin Initiative: Challenges to Implementation. *Managing Shared Waters Conference. Hamilton, Ontario, Canada*. Available at <http://nilebasin.com/documents/kim1.htm>, accessed 23 February 2010.

benefit of the Commission is that it can create an environment for friendly relationships between the three riparian States, especially after examining the legal positions of the riparian States emanated from State's rights and obligations and customary international law (referred as 'Task 1' in figure 7). Besides that, its main function is to govern two important aspects of the TERB, these are, directing Joint Technical Committee (referred as 'Task 2' in figure 7), and contributing to Treaty Making Process (referred as 'Task 3' in figure 7),²⁸ which will be discussed below:

7.2.1 Directing Joint Technical Committee

The said Joint Technical Committee established by the riparian States held several meetings for exchange of information, but such a committee could not bring the riparian States into any binding agreement on the TERB. In addition to political issues, sort of lack of trust has been observed between the riparian States arising from doubts over the credibility of information submitted by the other co-riparian States. Thus, based on the information submitted, the demand for water exceeded the actual supply of water available in the basin. The above factors made the function of the joint technical committee ineffective and therefore there are two options for the riparian States to follow: supervising the existing joint technical committee, or establishing separate technical committees for each State. As far as supervision is concerned, the Commission can administrate the Joint Technical Committee proceedings and set up rules and guidelines for the meetings. Each riparian State could establish its own technical committee to work only in their respective territories and submit all the necessary information to the Commission for data processing. Upon referring to its own or external experts, the Commission can establish the final set of information about the TERB.

²⁸ Figure 7, *Infra*, at p. 208.

7.2.2 Treaty Making Process

Based on a prior agreement, the Commission partakes or even supervise the treaty making process between the riparian States especially in resolving legal issues between the riparian States. For example, to identify what is the legal positions of riparian States are relying on the rights and obligations of the States under international law, which was discussed in Chapter Four of this thesis. Furthermore, upon consultations, the Commission can work and advice on defining crucial terminologies that each riparian State had own approach different from the others, such as the internationality of the TERB, whether the two Rivers should be regarded as a transboundary rivers that are not international or otherwise, as discussed in Chapter Six. In this context, the UNWC 1997 can be used to guide drafting of the scope, substantive norms, and procedural rules and dispute settlement mechanism of the new treaty between the riparian States. The riparian States can agree on new terminologies and definitions, such as ‘watercourse States’, groundwater ...etc. according to their geographical criteria. This practice may relieve Turkey from the predicament of signing the UNWC 1997 which is, in any case, not entered into force yet.

It is imperative for the parties to initially agree on the definitions and the substantive norms. In fact there are fundamental disagreements between the riparian States over the status of the term ‘watercourse States’ after the inclusion of ‘Party to this Convention’ before adopting the UNWC 1997. Unlike Turkey, both Iraq and Syria were unhappy with the inclusion of ‘Party to this Convention.’²⁹ Besides that, there are two other important disputed subjects that need to be settled.

²⁹ *The Official Record of the UNGA*. 1997. UNGA Sixth Committee, 62nd meeting. Available at www.un.org/ga/, accessed 14 August 2007.

It is worth mentioning that considerations should be given to the fact that each river has its own importance to Iraq and Syria. For Iraq both the Rivers are important, while Syria benefits mostly from the Euphrates. This issue can be settled between the riparian States and the term ‘the Basin’ should be defined clearly for the TERB. Thus, the riparian States need to agree on the definition that addresses the interests of all riparian States. For this purpose, they may refer to an outside expert opinion or to the ICJ, since the Member States are able to furnish all the necessary information to the Court for an advisory opinion in accordance with Article 65 (1) and (2) of the Statute of the Court.³⁰ Since all the three riparian States are Member State of the United Nations and by virtue of Article 93 of the Charter of the United Nations is *ipso facto* a party to the Statute of the Court.

Furthermore, the riparian States can proceed with discussing the substantive norms such as equitable utilisation and no significant harm, and how to compare it with the equitable utilisation. When discussing the procedural rules, as Caponera argues, conflicts arising from the absence of reciprocal information on any intended works could be prevented if the co-riparian States entered into a comprehensive water agreement. Based on prevailing international water law, including the Helsinki Rules and the UNWC 1997, such an agreement should include a specific duty to provide advance notification of any intended works. The establishment of a joint basin institution to act as a recipient of relevant information and to evaluate the possible harm

³⁰ Article 65 of the Statute provides that: 1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. 2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question. *Statute of International Court of Justice*. ICJ Website. Available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>, accessed 10 May 2010.

which might result from unilateral water resources development would facilitate the implementation of the agreement.³¹

Other than the above, the Commission may advise on essential provisions to be included in the treaty, such as monitoring, exchange of information, enforcement, and conflict resolution. As far as the monitoring provisions are concerned, they are often made to include provisions for data-sharing, surveying, and schedules for collecting data. Besides that information sharing generally builds good will and confidence between countries and enhances agreements. Some States classify river flows as classified information, and others use the lack of mutually accepted data as a stalling technique in their negotiations. Most monitoring clauses contain only the most rudimentary elements, perhaps due to the time and labour costs of gathering data.³²

Data collection by the treaty signatories can provide a solid basis for later discussions. In this context, a lesson can be learnt from the Indian and Bangladeshi experience where they previously could not agree on the accuracy of each other's hydrological records, but eventually agreed on Ganges flow data and based a workable agreement on that data in 1977.³³ The cooperation between engineers and council members of different nations can result in the formation of an epistemic community, another positive outcome of data gathering and sharing. Treaties do not yet include provisions to monitor compliance, but such additions may bolster trust and increase the strength of these epistemic bonds.

³¹ Caponera, Dante A., 2003. National and International Water Law and Administration. Netherlands: Kluwer Law International, at pp. 265-273.

³² Erdem, *Supra*, footnote 7.

³³ Upon the direction of the UN, India and Bangladesh signed Ganges Water Agreement on 5th November 1977 for the duration of 5 years. Mizanurrahman, M., 2006. The Ganges Water Conflict: A Comparative Analysis of 1977 and 1996 Treaty. *Asterisks*, 1&2, at p. 199. *also* Wolf, Aaron T., and Newton, Joshua T. Transboundary Dispute Resolution: The Ganges River Controversy: Case Study. *Institute for Water and Watersheds*, Oregon State University. Available at http://www.transboundarywaters.orst.edu/research/case_studies/Ganges_New.htm, accessed May 2010.

Last but not least, enforcement mechanisms are necessary provisions for the treaty to be successful. In this context, the riparian States should agree on the enforcement mechanism provisions. If there are misunderstandings between the riparian States, then conflict resolution mechanisms will help to solve disputes between the riparian States. Conflict resolution must further be clearly stated to resolve disputes through technical commissions, basin commissions, government officials, or third party intervention.

After all, it is true that cooperative water resources management is complex in any international river basin. In the Nile Basin, which is characterised by water scarcity, poverty, a long history of dispute and insecurity, and rapidly growing populations and demand for water, it is particularly difficult. This scenario is recurring in the TERB region. Therefore, comparative knowledge and practice to the water use of the Nile Basin by the riparian States would be advantageous for the riparian States of the TERB, as will be briefly discussed.

The Council of Ministers of Water Affairs of the Nile Basin, from all the nine riparian States³⁴ have agreed to initiate a partnership and led by themselves called the Nile Basin Initiative (hereinafter the 'NBI') and formally launched in February 1999. The NBI seeks to develop the river in a cooperative manner, share substantial socioeconomic benefits, and promote regional peace and security based on the reality that cooperative development holds the greatest prospects for bringing benefits to the entire region, and aware of the challenges. In addition to that, the NBI provides an institutional

³⁴ The nine riparian States are: Burundi, Democratic Republic of Congo, Egypt, Ethiopia, Sudan, Uganda, Kenya, Ruanda and Tanzania. Nile Basin Initiative Website, <http://www.nilebasin.org>, accessed February 2010.

mechanism, a shared vision, and a set of agreed policy guidelines to provide a basin wide framework for cooperative action.³⁵

One of the primary objectives of the NBI is that it aims to develop the Nile Basin water resources in a sustainable and equitable way to ensure prosperity, security, and peace for all peoples living in the basin region. Next, it endeavours to ensure efficient water management and the optimal use of the resources by the riparian States of the basin. Besides that it lays down the principle that cooperation and joint action between the riparian States of the Nile Basin, and through seeking win-win gains, poverty can be eradicated and economic integration promoted. Yet, all the planning is not alone a solution if they are not placed for action.³⁶

The riparian States have a strategic approach to achieving sustainable socioeconomic development in the basin through equitable utilisation of, and benefit from; the common Nile Basin water resources through means for converting this shared vision into concrete activities by laying the groundwork for cooperative action through a regional program to build confidence and capacity throughout the basin, which is called the Shared Vision Program. Furthermore, it arranges for pursuing simultaneously cooperative development opportunities to realise physical investments and tangible results through sub-basin activities in the region.³⁷

The NBI has reached in many successful achievements, such as proposing the Nile Trans-boundary Environment Action Project, which has made considerable progress, mainly in institutional capacities development, awareness creation, communities' skills development, and water quality monitoring. Another example is the Confidence

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

Building and Stakeholder Involvement Project. National Coordinators of this project have supported the National NBI Offices to coordinate NBI activities at National level, and these offices have worked closely with Governments in the organization of activities to raise awareness.³⁸

Water Resources Planning and Management Project is another successful story of the NBI. Under this project institutional set-up for the Decision Support System (hereinafter the 'DSS') is being put in place, and its needs assessment and design initiated. National DSS Units are being established in all the NBI countries to enhance capability on DSS related fields among the Nile riparian States. As a result, good practice and guidelines for water policy formulation and implementation were developed, and regional training course on the Integrated Water Resources Management IWRM-focusing on the water policy aspects conducted. Also, Applied Training Project was established to make progress in capacity building for practitioners and trainers, mainly through appreciation seminars, short courses and postgraduate training. Last but not least, Efficient Water use for Agricultural Production was established. In this project national consultants have been selected in most of the NBI countries and as a result, a rapid baseline assessment study of the agricultural sector has been initiated.³⁹

All the above are the good and positive aspects of the NBI, and as long as the riparian States are willing to interact with the NBI, regional peace, prosperity and stability will be sustained. Thus, it is beneficial for the riparian States of the TERB to take the NBI into considerations for the better management of the TERB. Hence, a roadmap can be drawn on how the Commission can examine the riparian States' rights and obligations

³⁸ Ibid.

³⁹ Ibid.

and the key provisions for the new treaty that need deliberations between the riparian States as shown in Figure 6. The Commission's main function is illustrated in Figure 7.

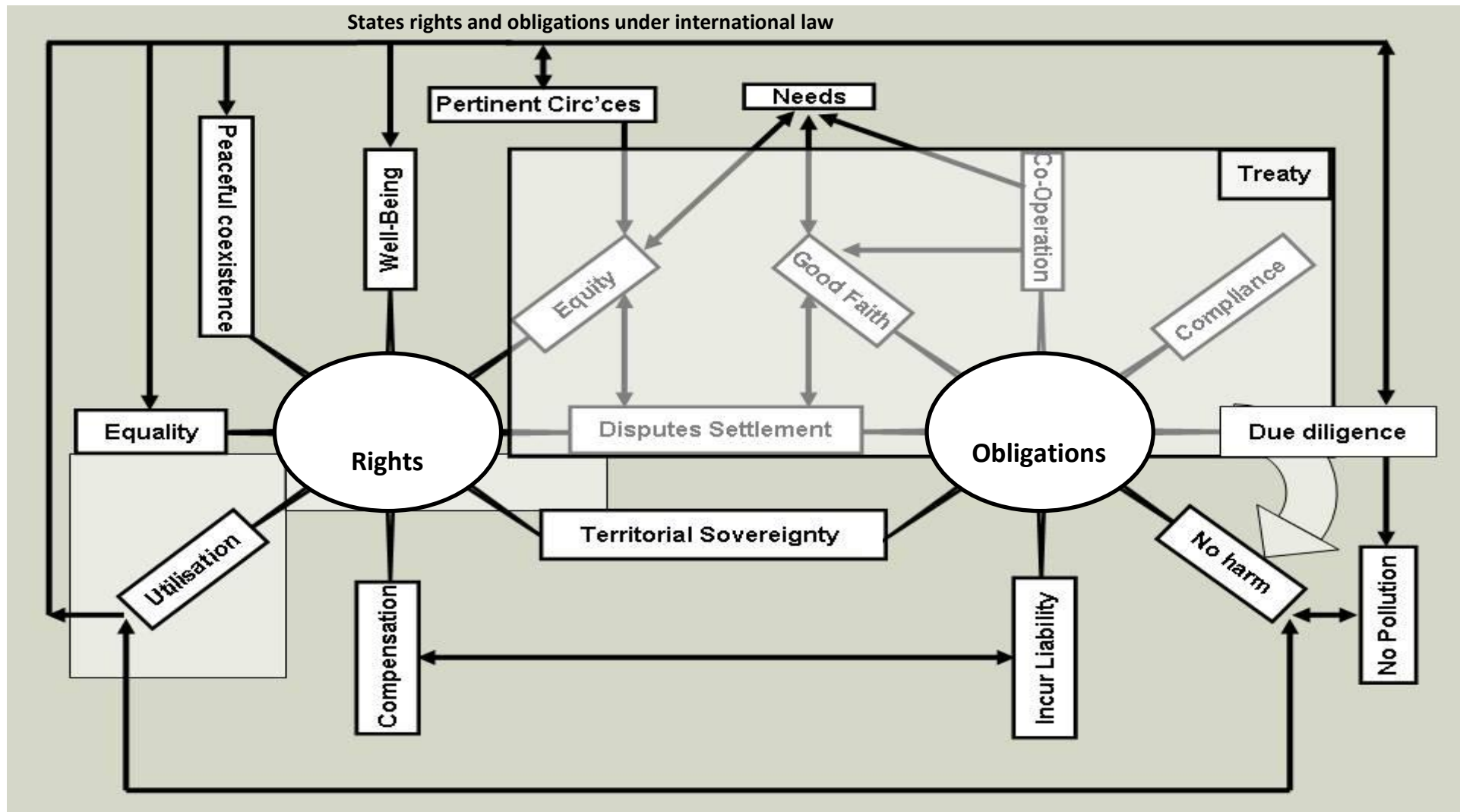


Figure 6: Roadmap for identifying State's Rights and Obligations, and provisions for making Treaty.

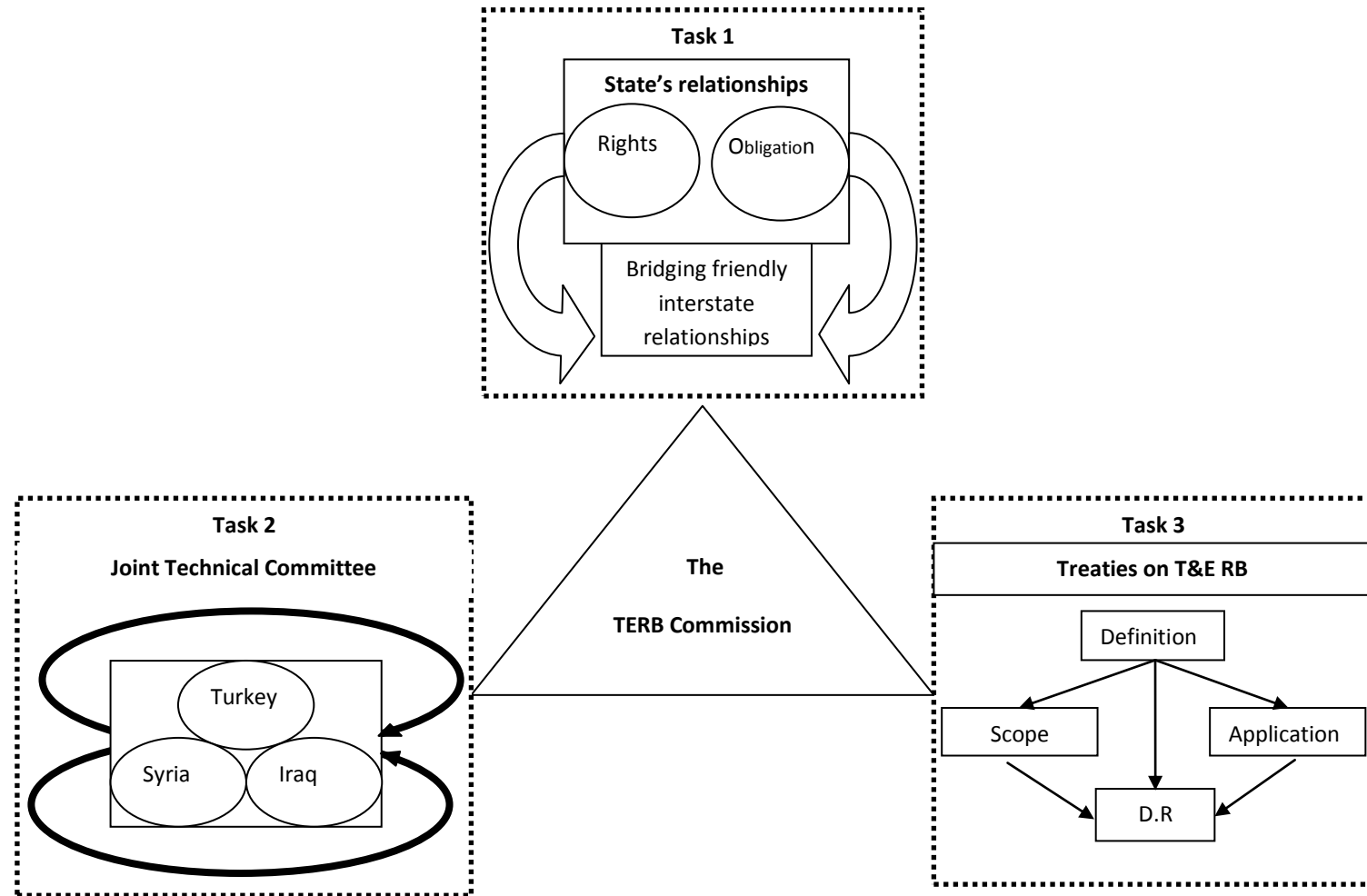


Figure 7: Functioning structure of TERS

7.3 Conclusion

In conclusion, Chapter Seven discussed a new phase of transboundary water management as a new regulatory framework to manage the Tigris and Euphrates River Basin. It was argued that previous negotiations involved various attempts to explore the political, legal and technical aspects of the issues and to develop corresponding approaches to settling differences, all of which appeared to have failed in reaching agreement on the legal concepts and criteria to follow. Hence, the aim of this chapter was to propose a new legal framework for managing the TERB more efficiently by the riparian States, which could be achieved through establishing the TERB Commission.

The recommended Commission has the duty of regulating legal, technical and compliance aspects, which are the three important aspects of the TERB. As far as the legal aspects are concerned, it was suggested that the key role of the Commission is to establish what exactly are the rights and obligations of the riparian States under international law, as the first step of identifying legal positions of the riparian States. Next, it was recommended that the Commission may supervise the joint technical committee directly with the intention of administrating the Committee's proceedings and setting up rules and guidelines for the meetings with some reference to outside experts if necessary. Another submission was that each riparian State, can individually establish its own technical committee and to work only in their respective territories. Upon providing all the necessary information to the Commission for data processing, it helps the Commission for managing the TERB. Meanwhile, each State's technical committee will act as consultant to the Commission and keep the data of the TERB in each territory updated for the Commission. Hence, the most reliable and dependable information about the TERB can be obtained. Last but not least, the treaty making

process should be given most significance. The main task of this process by the Commission is to facilitate in drafting the most appropriate treaty between the riparian States, identifying precise meanings for the terminologies used in the treaty with the aim of avoiding confusions or misinterpretations.

Finally, the treaty should also call for underpinning cooperation in the management, development, and protection of the joint water use and stress on the existing and potential needs of the riparian States as a step towards the community of interest doctrine. In this context, the positive examples of the NBI are highly recommended to be taken into considerations by the riparian States of the TERB.

CHAPTER EIGHT

CONCLUSION

Although water is the most abundant substance on earth, its global quantity is finite, and freshwater only a small fraction of the total. Water is an essential resource, and a source of life, for every living creature on this planet. Throughout the world, the economic benefits derived from water have always been substantial. In modern times, demand for the scarce resource continues to increase competition over both the quantity and quality of water supplies. This has the potential to result in tension, and indeed, conflict, between users and across political boundaries. This situation exists at a time when more than half of the world's population is predicted to suffer the direct consequences of water scarcity if current development patterns continue.

The situation in the Middle East is of particular concern to experts in the field; due to the lack of a clear water governance strategy, and very little cooperation, between the neighbouring States. The existing tensions in the region could worsen if there is no willingness to reach an agreement on the joint water use by the riparian States. In such circumstances, one riparian State exploits the water resources in the TERB as possible while ignoring the other States' riparian rights. Despite tremendous efforts by the experts since 1960s, a deadlock in negotiations is evidently the reason for the lack of any binding treaty between the riparian States over joint use of the TERB being concluded. As a result, each riparian State has continued the construction and operation of dam projects in their territories without a proper recourse and consultation with the co-riparian States.

The current thesis is considering in particular Iraq's equitable rights to the TERB. Iraq is identified as one of the five countries in the world where water supplies for irrigation are most threatened and where that threat could exacerbate regional instability. Furthermore, these problems faced by Iraq will worsen when the GAP construction is completed. This was the main reason for the researcher to contribute to the field, and particularly to advocate for Iraq's equitable rights to the TERB under international law. The researcher argues that a comprehensive legal framework, including a binding treaty, is the key solution to the conflict between riparian States. This argument is set out in the current thesis in eight chapters, as follows.

In Chapter One, the research process began with the hypothesis that international law is the principal instrument to support Iraq to achieve its legal entitlements to equitable and reasonable use of its transboundary waters. This was in response to the thesis question, 'how can international water law assist Iraq in securing an equitable and reasonable share of the waters of the Tigris and Euphrates River Basin?' The main objective behind the question was to determine how Iraq, as a new Federal State, can identify its legal rights to and obligations in sharing water with its neighbours; and further, to ascertain the maximum possible benefit provided by international law for Iraq concerning the equitable use of the water resources of the TERB.

Pursuant to the above objective, three key sub-objectives provided the main impetus to the thesis in identifying the key legal and political factors relating to the joint use of the TERB. Firstly, the application of international law established the context in which to understand how international water law applies to the TERB. Secondly, the legal positions of the riparian States were determined through the application of the international law. Thirdly, recommendations were made on the role of international

water law in strengthening the legal framework for equitable utilisation of the TERB, as a new phase of transboundary water management and potential cooperation between the riparian States.

The justifications for the thesis were twofold. Firstly, wars, economic sanctions and occupation over the last two decades, have left the water sector in Iraq in a very poor state, notwithstanding water shortages due to the GAP project upstream. In this context, there is a clear need to create a legal framework capable of managing the TERB that secures Iraq against water shortages, and allows Iraq to reconstruct its national water sector. Secondly despite numerous books, academic research and articles written on the TERB, only a very few focussed on the legal issues, and therefore there is need for a doctorate research in this field. Hence, this contribution is provided through this thesis.

Chapter Two discussed the importance of the TERB to the riparian States, the physical characteristics of the TERB, how the GAP affects the downstream riparian States' use of the TERB, and the current status of water demand and supply in Iraq after the 2003 US-led invasion. It was argued that, according to the relative irrigable land area between the riparian States, comparable data shows that Iraq has a larger irrigable area than Syria, which affords Iraq priority in water supply for irrigation from Turkey. Finally, within Iraq much of the return flow is now drained into the Arab Gulf through the Main Outfall Drain, but considerable saline return flow enters Iraq from both Syria and Turkey as a result of their use of water from the two rivers; this raises questions regarding the status of GAP under both international relations and international law.

Chapter Three emphasised the fact that, directly or indirectly, water has an influence on conflict in the strategic location of Middle East owing to the fact that the region has an

arid climate with only one percent of the world's available fresh water, and hydro-geographical diversities between the riparian States. Furthermore, water shortages faced by Iraq have prompted many other Middle Eastern States to implement national water security programmes to avoid similar circumstances occurring in their territories. Next, it was shown that inherent hegemonious attitudes of States are barriers to cooperation, and requires balance of power to counteract it. Bearing in mind that conflicts within the TERB involve complicated social, political and geographical issues, these along with poor governance additional obstacles to increased cooperation between the advantaged and disadvantaged riparian States.

The chapter concluded that States are naturally tempted to power, especially when controlling crucial resources such as water resources, and particularly when accompanied by stronger economic and military power compared to the neighbouring States. The controlling State can become a hegemon and create what is called the 'Rambo situation'. Such a scenario was argued to have validity to the regional context between Turkey, Syria and Iraq. The reason for this assertion is that Turkey has access to all the Tigris and Euphrates water resources as well as strong economic and military power; whereas the downstream States of Syria and Iraq lack those criteria. Furthermore, there is a lack of regularised inter-State relations that would necessitate recourse and reference to the application of international law, and which can effectively build trust and bring harmony to the TERB region. Thus, the Chapter has concluded that the vigorous examination of international law, its subjects, sources and its enforcement, and the progressive development of international water law is imperative in order to answer the thesis question.

Chapter Four examined the significance of international law pertaining to inter-State relations and the application of international law as a body of rules that are legally binding on States in their intercourse with each other, in which international agreements primarily create those binding rules upon the signatories. States are the main subject of international law, which acquires independence, legal equality and peaceful co-existence rights. Besides those rights, the obligation to refrain, the obligation to peaceful dispute settlement, and the obligation to cooperate are corresponding obligations of States.

One significant part of the Chapter was to consider Iraq's sovereignty under international law. It was concluded that since Iraq is a Member State of the United Nations, it should enjoy sovereignty over its territorial jurisdictions and like any other sovereign State bound by the UN Charter despite the 2003 US-led invasion. Furthermore, the UNSC Resolution 1483 brought another input to consolidate Iraq's sovereignty and territorial integrity despite the persistent occupation and state of chaos and disorder within Iraq.

Treaties are the primary source of international law, and are governed by the VCLT 1969. They must be signed in a good faith; and apart from State practice, *opinio juris* is the other component of international custom. General principles of law, even those that are controversial, may include principles that are common to a large number of systems of municipal law.

It is worth mentioning that basic rules enforcing international law that are represented in international agreements, whether general or particular, will become legally binding and accordingly enforceable upon those States that formally accept the agreements made

between them by duly signing them. However, enforcement on the non-signatories of international agreements will be still legally binding if the agreement represents customary law. Therefore, a State may not easily escape from an international obligation based on the excuse that the said State is not a signatory to an international agreement, such as the Turkish rejection of the UNWC 1997. Nevertheless, signing an agreement will consolidate a State's responsibility towards an obligation. Hence, there is a need to make particular agreements like treaties between the States, on the basis of such international legal rules and principles, for the purpose of settling particular issues between them. It was further concluded that States should not solely rely on international legal rules represented in international general agreements along with customary law and other sources of international law; as such rules may not provide an effective enforcement mechanism due to the fact that they only general rules; this is especially true in water management. Finally, when the UNWC 1997 received a high response at a global level in international forums, it can be said to reflect a high value of the function of international law, and more importantly reflects customary international law.

Chapter Five concentrated on the substantive norms provided by the UNWC 1997. They are namely the principle of equitable and reasonable utilisation, as laid down by Article 5, and the principle of no significant harm that provided under Article 7. The main focus on those two articles, as well as the procedural rules in the same Convention, aimed to ascertain whether or not the UNWC 1997, and its content of substantive and procedural rules, does actually represent customary international law. It concluded that since the content of UNWC 1997 largely adheres to binding instruments within the framework of general international law, it might no longer fall under particular international law. In the context of more water shortages and where conflicts between States arise in the future, it

is likely that more States will come forward to cooperate and recognise the UNWC 1997 and abide by it. This is based on the compelling fact that water resources are the property of all mankind and all have the right to access it.

Next, it was found that States are at liberty to challenge a rule in question if it can demonstrate its persistent objection to that rule by virtue of its membership in the UN or as a member of a regional group based on their national interests. However, it was argued that although Turkey voted against UNWC 1997, its claim of ‘persistent objection’ is invalidated by its inconsistent treaty and State practice; therefore the main principles of UNWC 1997 still apply to Turkey. Therefore, the UNWC 1997 should be used as the basis of the legal positions of the riparian States of the TERB.

In Chapter Six, it was argued that there is no single effective treaty between all the three riparian States covering the use of water resources within the TERB. This situation highlights the necessity of signing a comprehensive treaty between the riparian States. Furthermore, most, if not all, of the protocols were made during times of conflict and therefore those protocols were influenced by other issues considered more important for the national security of each riparian State. As a result, issues regarding the water resources of the TERB were given a much lower priority compared to the other issues. However, sooner or later, water resources will come to dominate the challenges faced by the TERB riparian States and will require a change in attitude towards the joint use of the TERB and which can be formalised through signing a binding treaty.

Later in the chapter, the legal positions of riparian States on the utilisation of the TERB were examined. It was argued that the Turkish view that the TERB comprises only one basin is valid in terms of its hydrological definition. However, the Turkish approach

to deem the TERB as a transboundary watercourse with no international character seems incongruous with the definition and modern understanding of the term 'transboundary river' and undermines the rights of the other sovereign States which is contrary to international law.

Unlike Turkey, both Syria and Iraq claim similar historical rights over the TERB. However, Syria argues that the Euphrates River should be utilised by Syria once it leaves Turkish territory and Iraq should utilise the Tigris. Using this logic, Syria believes that the two rivers should be considered differently for the two different downstream States. Iraq argues that no matter how the two rivers are considered, Iraq needs water from both rivers to survive. Iraq's argument that the imminent creation of an independent Kurdish State would necessitate a claim for more water is no longer relevant; since it now appears that the Kurds are content to remain under Iraq as an autonomous State. Thus, it was suggested that in order to avoid potential conflicts, which come from the riparian States fundamental incongruities over the TERB, it is suggested that the riparian States deal with the problem on a regional scale, taking into account the needs and the capacities of all States.

As to the principles of the equitable utilisation, it was argued that since both Iraq and Syria are the parties of the UNWC 1997 Convention, it can be concluded that the first fundamental legal right of the riparian States is to utilise the water from both the Tigris and Euphrates Rivers equitably considering all the social, economical and vital human needs factors. It was nonetheless argued that Turkey in principle agrees with the article itself, but disagrees with how the compensation should be made, and it brings more relief for both Syria and Iraq to negotiate further with Turkey on this ground. Next, as to the exchange of information, it was stated that international law is concerned with

protecting all States equally through both conceptualising and realising the rights and obligations of States. Thus, like both Iraq and Syria, Turkey should be bound by this obligation, especially if it is made more precise to protect the interests of Iraq and Syria accordingly. Finally, like Iraq and Syria, it can be argued that Turkey does not object to dispute settlement if a consensus agreement is reached on how to set mechanisms to solve disputes, which may mean that Turkey implicitly agrees with the UNWC 1997.

Last but not least, State's compliance with international obligations was discussed. It has been concluded that international legal agreements are made to solve common problems between States that they have difficulties in solving unilaterally or through political means alone. Thus, it is crucial for the riparian States of TERB to consider the creation of a legal and binding comprehensive treaty that can meet all the legal and institutional needs of the riparian States.

Chapter Seven focussed on recommendations for establishing the TERB Commission. The researcher has discussed a *new phase of transboundary water management as a new regulatory framework to manage the TERB. It was argued that* previous negotiations involved various attempts to explore the political, legal and technical aspects of the issues and to develop corresponding approaches to settling the differences, all of which appeared to have failed to reach a consensus on the legal concepts and criteria to follow. Hence, the task of this chapter was to discuss how the TERB Commission should function so as to manage the TERB more efficiently by the riparian States in the future.

The recommended Commission would have the task of regulating the legal, technical and compliance aspects, the three important aspects of the TERB. *Regarding legal aspects, it was suggested that* the main task of the Commission would be to precisely

establish the rights and obligations of the riparian States under international law, as the first task of identifying legal positions of the riparian States. Next, it was recommended that the Commission supervise the joint technical committee directly, with the intention of administrating the Committee's proceedings and setting up rules and guidelines for the meetings with some reference to outside experts if necessary. Another recommendation was that each riparian State, would individually establish its own technical committee to work only in their respective territories. These committees would submit all the necessary information to the Commission for data processing, and would help the Commission in managing the TERB. Meanwhile, each State's technical committee would act as consultant to the Commission and keep the data of the TERB in each territory updated for the Commission. Hence, the most reliable and dependable information about the TERB would be obtained. Finally, the treaty making process should be given its most significance. The main task of this process would be to draft the most appropriate treaty between the riparian States, defining the most precise meanings for the terminologies used in the treaty with the aim of avoiding confusion or ambiguities in interpretations. The Treaty should emphasise cooperation as an obligation to establish a stronger joint regional management in matters related to the development of water resources and the prevention of contamination, it can be said that cooperation is reflected in the establishment of the Joint Water Committee. Finally, the Committee would also call for cooperation in the management, development, and protection of the shared water resources and stress the need to cope with the existing and potential needs of the riparian States as a step toward the community of interest doctrine. In this context, the positive examples of the NBI are worth considering and highly recommended to be followed by the riparian States of the TERB.

Other than the recommendations provided by through the discussions in Chapter Eight, this thesis identifies further issues that require actions, as follows:

An important action for the riparian States to undertake is the recourse to the ICJ for identifying the actual legal positions of the riparian States. As it has been discussed in Chapters Six and Seven that the ICJ has the power to interpret a particular rule of international law, this power can help the riparian States in obtaining a clear interpretation and definition of controversial terms, such ‘transboundary’ and ‘international rivers’.

Next, as been argued in Chapter Six, the US occupation of Iraq caused political instability and a lack of security within Iraq, while the US-Turkish relationship is friendly and cooperative in various aspects. Thus, if the US is directly involved in the riparian States’ negotiations, a better outcome could be achieved, as it would be the responsibility of the US, as an occupier, to ascertain Iraq’s, the occupied territory, satisfactory supply of water.

Finally, as a recommendation beyond what has been covered in this thesis, the researcher proposes an international conference and forum as a mechanism for supporting the riparian States’ negotiation process. Such a forum would allow external experts, authors and researchers to contribute their knowledge, and advise the riparian States. Another advantage of such a forum is that the work of adopting a legal framework for the TERB draws on a wider perspective that goes beyond the riparian States’ approaches towards the TERB, as it is stated, ‘two brains are better than one’.

Future research

The researcher takes the initiative of recommending that research should be undertaken on introducing water legislation to Iraq, and how such legislation could improve Iraq's national water sector.

Research examining how the national water sector in Iraq can be improved in order to meet its future treaty obligations on sharing waters with Turkey and Syria, is another recommendation for further research.

ANNEX I

**Treaty of Friendship and Neighbourly Relations between Iraq and Turkey was
signed at Ankara, on 29 March 1946**

No. 580

**IRAQ
and
TURKEY**

Treaty of friendship and neighbourly relations, and six annexed protocols as follows:

No. 1—relative to the regulation of the waters of the Tigris and Euphrates and of their tributaries;

No. 2—relative to mutual assistance in security questions;

No. 3—relative to co-operation in educational, instructional and cultural matters;

No. 4—relative to postal, telegraphic and telephonic communications;

No. 5—relative to economic questions;

No. 6—relative to the frontier.

Signed at Ankara, on 29 March 1946

Arabic, Turkish and French official texts communicated by the Minister of Foreign Affairs of Iraq and the Permanent Representative of Turkey to the United Nations. The registration took place on 15 September 1949.

TRANSLATION — TRADUCTION

No. 580. TREATY¹ OF FRIENDSHIP AND NEIGHBOURLY
RELATIONS BETWEEN IRAQ AND TURKEY. SIGNED
AT ANKARA, ON 29 MARCH 1946

His Majesty FEISAL II, King of Iraq,

and

His Excellency ISMET INÖNÜ, President of the Turkish Republic,

inspired by the desire to strengthen further the friendly and neighbourly relations happily established between Iraq and Turkey and to reinforce the sympathy and bonds of brotherhood which have existed for centuries between the two peoples,

considering that their foreign policy is firmly based on the conviction that the ideal of peace and security held by these two peoples is inseparable from the peace and security of the peoples of the world, and especially of the Middle East,

happy to find in the clauses of the United Nations Charter recently signed at San Francisco and aiming at the development of international solidarity, provisions confirming their own aspirations, and encouraging them to fresh efforts in this connexion,

considering that the establishment of closer ties between them can be effectively assisted by understanding and mutual aid in the economic field,

with the legitimate ambition of being the first to put into effect the above-mentioned principles of the United Nations Charter, and being desirous of remaining faithful to the obligations incurred under the Charter,

have become convinced of the need to conclude an Agreement for the purpose of giving effect to the considerations indicated above and have to this end appointed as their Plenipotentiaries:

His Majesty FEISAL II, King of Iraq:

His Excellency Al Farik Nuri ESSAID, President of the Senate, Order of Rafidain First Class;

¹ Came into force on 10 May 1948, by the exchange of the instruments of ratification at Baghdad, in accordance with article 7.

His Excellency Abdul Ilah HAFİDH, Member of the Chamber of Deputies;

His Excellency İSMET İNÖNÜ, President of the Turkish Republic:

His Excellency Hasan SAKA, Deputy of Trabzon, Minister of Foreign Affairs;

His Excellency Feridun Cemal ERKİN Secretary-General of the Ministry of Foreign Affairs, Ambassador of Turkey;

Who, having exchanged their full powers, found in good and due form, have agreed upon the following provisions:

Article 1

Each of the High Contracting Parties undertakes to respect their territorial integrity and their common frontiers as defined and delimited in the Treaty concluded in 1926.¹

Article 2

Each of the High Contracting Parties undertakes to observe a policy of absolute non-intervention in the domestic affairs of the other.

Article 3

With regard to international affairs in general, and more especially those having a regional character affecting themselves, the High Contracting Parties undertake to consult each other, and in the policies pursued by them, to afford each other full support and co-operation within the framework of the United Nations.

Article 4

The High Contracting Parties undertake to refer to the competent organ of the United Nations without delay any threat of aggression or any violation of the territorial integrity or frontiers of either Party.

Article 5

The High Contracting Parties undertake, in conformity with the provisions of Article 33 of the United Nations Charter, to settle by peaceful means all disputes which may arise between them and to refer to the Security Council, in conformity with the provisions of Article 37 of the Charter, any disputes which they may fail to settle by these means.

¹ League of Nations, *Treaty Series*, Volume LXIV, page 379.

Similarly, the High Contracting Parties undertake to make every effort to bring about the settlement, in accordance with the same provisions, of any disputes which may arise between one of them and a third neighbour State, or between two neighbour States.

Article 6

The High Contracting Parties being anxious, in keeping with the spirit of the present Treaty, to achieve co-operation in all aspects of their relations, have concluded the Protocols indicated below, which shall form an integral part of the present Treaty.

PROTOCOLS:

Protocol No. 1—relative to the regulation of the waters of the Tigris and Euphrates and of their tributaries,

Protocol No. 2—relative to mutual assistance in security questions,

Protocol No. 3—relative to co-operation in educational, instructional and cultural matters,

Protocol No. 4—relative to postal, telegraphic and telephonic communications,

Protocol No. 5—relative to economic questions,

Protocol No. 6—relative to the frontier.

The High Contracting Parties have also concluded the following conventions:

CONVENTIONS:

Extradition Convention,¹

Convention in respect of legal assistance in civil, penal and commercial matters.²

Article 7

The present Treaty shall remain in force for an unlimited period, and may, at the request of one of the High Contracting Parties, be revised every five years.

¹ See page 369 of this volume.

² See page 333 of this volume.

It shall be ratified by each of the High Contracting Parties, and the instruments of ratification shall be exchanged at Baghdad as soon as possible.

DONE at Ankara, on 29 March 1946, in three copies, in Arabic, Turkish and French, the latter being authentic in case of dispute.

Noury SAID

Hasan SAKA

A. HAFIDH

Feridun Cemal ERKIN

PROTOCOL No. 1

RELATIVE TO THE REGULATION OF THE WATERS OF THE
TIGRIS AND EUPHRATES AND OF THEIR TRIBUTARIES

IRAQ and TURKEY,

recognizing the importance for Iraq of the construction of conservation works on the Tigris and Euphrates and their tributaries, in order to ensure the maintenance of a regular water supply and the regulation of the water-flow of the two rivers with a view to avoiding the danger of floods during the annual periods of high-water,

considering that it will probably be found after investigation that the most suitable sites for the construction of dams and other similar works, the entire cost of which shall be defrayed by Iraq, lie in Turkish territory,

being also in agreement upon the need for installing permanent observation stations in Turkish territory to record the water-flow of the above-mentioned rivers and to communicate regularly to Iraq the result of these observations,

accepting the principle that the construction of conservation works upon these rivers should as far as possible, and in the interests of both countries be adapted to purposes of irrigation and the production of hydro-electric power,

have agreed as follows:

Article 1

Iraq may, as soon as possible, send to Turkey groups of technical experts in its service to make investigations and surveys, collect hydraulic, geological and other information needed for the selection of sites for the construction of

dams, observation stations and other works to be constructed on the Tigris, the Euphrates and their tributaries, and prepare the necessary plans to this end.

The maps produced in accordance with the results of these surveys shall be prepared by the competent Turkish services.

All the expenditure incurred in the work mentioned in the present article shall be defrayed by Iraq.

Article 2

The above-mentioned technical experts shall collaborate in their work with Turkish technical experts, and Turkey shall authorize them to proceed to the places to be visited and shall provide them with the information, assistance and facilities necessary for the accomplishment of their task.

Article 3

Turkey shall install permanent observation stations and shall ensure their operation and maintenance. The cost of operation of these stations shall be defrayed in equal parts by Iraq and Turkey, as from the date of entry into force of the present Protocol.

The permanent observation stations shall be inspected at stated intervals by Iraqi and Turkish technical experts.

During periods of high-water the levels of water observed every day at 8 a.m. by the stations equipped for telegraphic communication, such as Diyarbakir, Cizre, etc., on the Tigris and Keban, etc., on the Euphrates, shall be communicated by telegram to the competent authorities designated by Iraq for this purpose.

The levels of water observed outside periods of high-water shall be communicated to the same authorities by means of bi-monthly bulletins.

The cost of the above-mentioned communications shall be defrayed by Iraq.

Article 4

The Turkish Government accepts in principle the construction, in conformity with the agreement mentioned in the next paragraph, of any works which may be found necessary as a result of the studies provided for in article 1.

Each work, other than the permanent observation stations, shall be the subject of a separate agreement in respect of its site, cost, operation and maintenance, as well as its use by Turkey for purposes of irrigation and power production.

Article 5

Turkey shall keep Iraq informed of her plans for the construction of conservation works on either of the two rivers or their tributaries, in order that these works may as far as possible, be adapted, by common agreement, to the interests of both Iraq and Turkey.

Article 6

Each of the High Contracting Parties shall appoint a representative as soon as possible after the signature of the present Protocol.

The two representatives shall confer together on all questions relating to the putting into force of the present Protocol, and shall act as intermediaries between the two Parties in their communications on this subject.

Noury SAID

Hasan SAKA

A. HAFIDH

Feridun Cemal ERKIN

PROTOCOL No. 2

RELATIVE TO MUTUAL ASSISTANCE IN SECURITY QUESTIONS

Article 1

Each of the High Contracting Parties undertakes to receive, in the event of their expulsion, nationals of a third Power, who having passed through its own territory, have entered the other Party's territory without being supplied with a passport or valid travel document.

Article 2

Should one of the High Contracting Parties desire to expel the national of a third Power and return him to his country of origin, the other Party shall grant the transit visa requested for this purpose, and should the expelled person not be admitted by his country of origin, the Party which made the request for expulsion shall be obliged to receive the expelled person into its own territory.

Article 3

Each of the High Contracting Parties reserves the right to prohibit, either in virtue of a legal sentence, or under the laws and regulations upon morality, health or mendicancy, or for reasons connected with the internal or external

ANNEX II

**Law No. 14 of 1990, Ratifying the Joint Minutes Concerning the Provisional
Division of the Waters of the Euphrates River.**

Between Iraq and Syria

**LAW NO. 14 OF 1990, RATIFYING THE JOINT MINUTES CONCERNING
THE PROVISIONAL DIVISION OF THE WATERS OF THE EUPHRATES
RIVER.**

ARTICLE 1 :

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Ratification of the Joint Minutes concerning the provisional division of the Euphrates waters between the Republic of Iraq and the Arab Republic of Syria signed in Baghdad on 11 Ramadan 1409 Hegira which falls on 17 March 1989 and the Speech of the Head of the Syrian Delegation in the Joint Technical Committee for Territorial Waters delivered before signing the Joint Minutes after the addition of the expression (by the approval of the Two Parties) to the end of the First Paragraph of the Speech although to be read as the following: (the Two Brothers Arab Parties will work together for the re-examination of it and to do the necessary modification on the condition that will be done with the approval of the Two Parties).

ARTICLE 2:

=====

This Law is to be published in the Official Gazette and to be implemented by the competent ministers.

JOINT MINUTES

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On the occasion of the thirteenth session of the Joint Technical Committee for Territorial Twerps in Baghdad, the Two Parties Iraq and Syria held a meeting on 11 Ramadan 1409 Hegira which falls on 17 April 1989 in the seat of the Ministry of Agriculture and Irrigation in Baghdad to exchange the point of view around the theme of the Euphrates Waters in a atmosphere characterised by the sense of friendship and the high spirit of responsibility toward the common, vital and legitimate interests of the Two Brothers Countries in the waters of Euphrates River.

Owing to intensive discussion and consultation carried out with considerable patient and effort between the Two Parties, and understanding the necessity to act quickly for reaching a bilateral agreement between them to facilitate the fulfilment of their common

wish by reaching a trilateral agreement with Turkey around the division of the waters of Euphrates River.

Taking note of all these, the Two Parties Iraq and Syria waiting for reaching the trilateral agreement with Turkey agreed in the following:

1. The Iraq water share on the border region between Iraq and Syria is 58% as a fixed annual total percentage (water year) of the water of Euphrates River allowed to pass in Syria through the border with Turkey, and the Syrian share of water is the remainder quantity 42% of the water of Euphrates River allowed to pass through the border between Turkey and Syria.
2. Creation of a joint committee for laying down all technical and administrative details to implement the Agreement in the best way to realize the common interests.
3. The Agreement will be operative from the date of exchange of diplomatic notes notified of ratification in conformity with regulations.

Written down in Baghdad on 11 Ramada 1409 Hegira which falls on 17 April 1989 in Arabic in two original copies with the same effect and validity wherever the Two Parties preserved a copy for self.

For the Syrian Arab Republic

For the Iraqi Party

Zuheir Farah Abu Dawoud

Ghadban Ali Sahil

Head of the Syrian party in the
Technical Committee for
Territorial Waters.

Head of the Iraqi Party Joint
in the Joint Technical
Committee for Territorial Waters.

ANNEX III

Agreement Between Syria and Turkey

- (1) Turkey's specific demands from Syria to comply with the basic norms and principles of international relations signed on October 22nd 1996
- (2) Unofficial Translation of the agreed minutes between Turkey and Syria signed in Adana, on October 20th 1998.

(3)

(1) Syrian-Turkish Agreement 22.10.96**Turkey's Specific Demands from Syria**

In order to normalize our relations, we expect Syria to comply with the basic norms and principles of international relations. In this regard, the following specific demands should be met:

Given the fact that Turkish-Syrian relations were seriously damaged by Syrian support for terrorism, we want Syria to accept formally its obligations and renounce its previous stand on this matter. These obligations should include a formal commitment not to give terrorists support, sanctuary, and financial assistance. Syria should also prosecute PKK perpetrators and extradite to Turkey the chief of the PKK, Abdullah Ocalan and his collaborators.

Within this framework, Syria should not:

- * Permit camps for terrorist training to operate in territories under its control,
- * Provide weapons, logistic materials to the PKK,
- * Provide fraud identification documents to PKK members,
- * Help terrorists in obtaining legal passage and infiltration into Turkey,
- * Permit the propaganda activities of the terrorist organization,
- * Allow the PKK to operate in accommodations in its territory,
- * Facilitate the passages of terrorists from third countries (Europe, Greece, Southern Cyprus, Iran, Libya, Armenia) to northern Iraq and Turkey.

Syria should provide:

- * Cooperation in all activities aimed at fighting terrorism.
- * Abstention from inciting other countries which are members of the Arab League against Turkey.

In light of the above, unless Syria refrains from these acts immediately, with all the consequences, Turkey reserves the right to exercise her inherent right of self-defense, and under all circumstances to demand just compensation for the loss of life and property. Indeed, these views were transmitted to Syria through diplomatic channels on 23 January 1996. However, our warnings have fallen on deaf ears.

(2) MINUTES (Unofficial Translation)

In light of the messages conveyed on behalf of Syria by the President of the Arab Republic of Egypt, H.E. Mr.. Husni Mubarak and by the Iranian Foreign Minister H.E. Mr.. Remal Harrazi on behalf of the Iranian President H. E. Mr.. Seyid Mohammed Khatemi and by the Foreign Minister of the Arab Republic of Egypt, H.E. Mr.. AMr. Moussa, the Turkish. and Syrian delegations whose names of which are listed in the attached list (Annex 1) have met in Adana on 19 and 20 October 1998 to discuss the issue of cooperation in fighting terrorism.

In the meeting, the Turkish side repeated the Turkish demands presented to the Egyptian President (Annex 2) to eliminate the current the current tension in their relations. Furthermore, the Turkish side brought to the attention of the Syrian the reply that was received from Syria through the Arab Republic of Egypt which entails the following commitments:

1. As of now, Ocalan is not in Syria and he will definitely not be permitted to enter Syria.
2. PKK elements abroad will not be permitted to enter Syria.
3. As of now PKK camps are not operational and definitely will not be permitted to become active.
4. Many PKK members have been arrested and have been taken to court. The lists are available, and Syria has delivered these lists to the Turkish side.

The Syrian side has confirmed the above mentioned points. Furthermore, the parties have also agreed on the following

points:

1. Syria, on the basis of the principle of reciprocity, will not permit any activity which emanates from its territory aimed at jeopardizing the security and stability of Turkey. Syria will not allow the supply of weapons, logistic material, financial support to, and propaganda activities of, the PKK on its territory.
2. Syria has recognized that the PKK is a terrorist organization. Syria has, alongside other terrorist organizations, banned all activities of the PKK and its affiliated organizations on its territories.

3. Syria will not allow the PKK to establish camps and other facilities for training and shelter, or to have commercial activities on its territory.
4. Syria will not allow PKK members to use Syria for transit to third countries.
5. Syria will take all necessary measures to prevent the head of the PKK terrorist organization from entering into Syrian territory and will instruct its authorities at border points to that effect.

Both sides have agreed to establish certain mechanism for the effective and transparent implementation of the measures

mentioned above.

In this context:

- a) A direct phone link will immediately be established and operated between the high-level security authorities of the two countries.
- b) The Sides will appoint two special representatives each to their diplomatic missions and these officials will be presented to the authorities of the host country by the heads of mission.
- c) The Turkish side, within the context of combating terrorism, has proposed to the Syrian side to establish a system that will enable the monitoring of security enhancing and their effectiveness. The Syrian side has stated that it will present this proposal to the authorities for approval and will inform Turkey on the result as soon as possible.
- d) The Turkish and Syrian sides, contingent upon obtaining Lebanon's consent, have agreed to take up the issue of the combat against PKK terrorism in a tripartite framework.
- e) The Syrian side has committed itself to take the necessary measures for the implementation of the points mentioned in this "Minutes" and for the achievement of concrete results.

Adana, October 20, 1998

For the Turkish Delegation

Ambassador Ugur Ziyal

Foreign Ministry

Deputy Under-Secretary
Security

For the Syrian Delegation

Major General Adnan

Badr Al Hassan

Head of Political

ANNEX IV

Joint Communiqué between GAP and GOLD

Joint Communiqué between Republic of Turkey Prime Ministry Southeastern Anatolia Project Regional Development Administration (GAP), *and* Arab Republic of Syria Ministry of Irrigation General Organization for Land Development (GOLD)

23 August 2001

Ankara-TURKEY

JOINT COMMUNIQUÉ
Between
Republic of Turkey
Prime Ministry
Southeastern Anatolia Project Regional Development Administration
(GAP)
and
Arab Republic of Syria
Ministry of Irrigation
General Organization for Land Development
(GOLD)
23 August 2001
Ankara-TURKEY

Based on the invitation by H.E. Mustafa Yilmaz, Minister of State of Republic of Turkey; H.E. Taha al-Atrash, Minister of Irrigation of Arab Republic of Syria, accompanied by a technical delegation paid a visit to Turkey during the period of August 21-26, 2001.

Several meetings were held between the two ministers and their respective delegations. The following points are agreed upon to be realised between GAP Administration and GOLD:

A. Training Programs

Three groups of training courses will be considered under this program.

- International training courses of GAP will be made available for the attendance of the Syrian experts.
- GAP will organize custom-made courses to be attended by Syrian experts.
- The two parties will organize joint courses.

The Basic principles regarding the training programs are as follows:

- Training courses can be conducted in English, Turkish, and/or Arabic, as appropriate.
- Custom-made and joint courses can be gradually extended, upon mutual agreement, to the participants from other Arabic speaking countries. These courses can be organized/implemented in both countries.

Both parties have agreed to realize the first custom-made course in 2001, and the first joint course in early 2002.

B. Joint Projects

GAP and GOLD will identify, plan and implement joint projects. Scope and basic components (location, content and finance etc.) of these projects will be determined jointly by both organizations and relevant agencies. One of the first projects could be the development of twin protection areas-one from each country to be studied, planned and implemented as a Twin Development Project. Such projects will be carried out, when applicable, with the participation of other organizations from the two countries.

C. Exchange Programs/Partnership

- Exchange of visits of top executives, preferably on an annual basis,
- Exchange of experts and staff,
- Cooperation between the GAP Agricultural Research Station in Koroklu in Turkey, and the Martyr Basel Al-Assad Research Center in Syria.

The General Directorate of Rural Services (KHGM) of Turkey can take part, under the coordination of GAP, in the above-mentioned programs, projects, and partnerships and can offer its standard courses and the services of its Agricultural Hydrologic Research and Training facilities within the framework of this agreement.

Other parties, institutions, agencies etc., can be included in the above-mentioned programs, projects and partnerships upon mutual consent of GAP and GOLD.

Gap and GOLD will appoint, within one month following the signing of this document, their respective contact persons who will carry out the tasks for the implementation of this agreement.

New topics, programs or activities that are not included in this document can be added in the future, based on mutual agreement.

Dr. I. H Olcay UNVER
President
GAP

Eng. Kays al-ASSAD
Director General
GOLD

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